No. 87-6405-CSY
Status: GRANTED
CAPITAL CASE

Title: Phillip D. Tompkins, Petitioner
v.
Texas

Docketed:
February 10, 1988

Court: Court of Criminal Appeals of Texas

Counsel for petitioner: Lewis III,Emmett B.

Counsel for respondent: Palmer,Charles A.

Entry	Date	Note	Proceedings and Orders
1	Jan 4 1988		Application for extension of time to file petition and order granting same until February 10, 1988 (White, January 5, 1988).
2	Feb 10 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Mar 15 1988		Order extending time to file response to petition until April 11, 1988.
6	Apr 11 1988		Order further extending time to file response to petition until April 21, 1988.
7	Apr 19 1988		Brief of respondent Texas in opposition filed.
8	Apr 28 1988		DISTRIBUTED. May 12, 1988
9	May 5 1988	X	Reply brief of petitioner Phillip D. Tompkins filed.
11	May 16 1988		Petition GRANTED. Justice O'Connor OUT.
			**********
16	Jun 13 1988		The order of May 16, 1988, granting the petition for a writ of certiorari is amended to read as follows: "The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition. Justice O'Connor took no part in the consideration or decision of this petition."
13	Jul 1 1988		Order extending time to file brief of petitioner on the merits until July 23, 1988.
15	Jul 22 1988		Brief amici curiae of ACLU, et al. filed.
19	Jul 22 1988		Brief amicus curiae of Lawyers' Committee For Civil Rights Under Law filed.
14	Jul 23 1988		Brief of petitioner Phillip D. Tompkins filed.
17	Jul 29 1988		Record filed.
		*	Certified original record received. (2 boxes).
18	Jul 29 1988		Joint appendix filed.
21	Aug 22 1988		Order extending time to file brief of respondent on the merits until September 16, 1988.
22	Sep 16 1988		Brief of respondent Texas filed.
23	Sep 28 1988		CIRCULATED.
24	Sep 30 1988		Set for argument. Tuesday, December 6, 1988. (4th case) (1 hr.)
25	Oct 17 1988	X	Reply brief of petitioner Phillip D. Tompkins filed.
26	Dec 6 1988		ARGUED.

EDITOR'S NOTE

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87-6405

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

PHILLIP D. TOMPKINS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals misapplied this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980) by holding that an instruction on lesser included offenses is not required in a capital case unless the evidence that would support such offenses emanates from the defendant's own evidence, even though such offenses would be supported by logical inferences that could be drawn from the prosecution's evidence.

2. Whether the Texas Court of Criminal Appeals applied the proper standards under Batson v. Kentucky, 106 S. Ct. 1712 (1986) in determining whether the prosecution had satisfactorily explained its use of peremptory challenges to exclude all blacks from the jury, when the court accepted facially dubious explanations from the prosecutors while refusing to consider objective evidence in the record, which demonstrated that the prosecution's explanations for such challenges were not plausible.

3. Whether, as applied, the first and second statutory sentencing questions in the Texas capital sentencing procedure satisfy the constitutional requirements articulated by this Court in cases decided since Jurek v. Texas, 428 U.S. 262 (1976).

LIST OF PARTIES

The parties to the proceedings below and in this Court are petitioner Phillip D. Tompkins and the State of Texas.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
1. The Case	2
2. The Facts	3
3. Failure to Instruct on Lesser Included Offenses	4
4. The Batson Issue	5
5. Challenge to the Constitutionality of Texas Capital Sentencing Scheme	6
REASONS FOR GRANTING THE WRIT	7
I. THE TEXAS COURT OF CRIMINAL APPEALS MISAPPLIED THIS COURT'S DECISION IN BECK v. ALABAMA	7
1. The court of appeals erred in concluding that there was no evidence that would support the lesser included offenses	8
2. The court of appeals misread Beck	10
II. THE APPROACH ADOPTED BY THE TEXAS COURT OF CRIMINAL APPEALS IN ACCEPTING THE DISTRICT COURT'S BATSON FINDINGS WOULD, IF ACCEPTED, VITIATE THIS COURT'S DECISION IN BATSON v. KENTUCKY	14
III. AS APPLIED, THE FIRST AND SECOND CAPITAL SENTENCING QUESTIONS IN TEXAS DO NOT SATISFY THE CONSTITUTIONAL REQUIREMENTS FOR CAPITAL SENTENCING PROCEDURES ARTICULATED BY THIS COURT IN CASES DECIDED SINCE BECK	21
CONCLUSION	25

TABLE OF AUTHORITIES

Cases	Page
Anderson v. Bessemer City, 470 U.S. 564 (1985)	20
Batson v. Kentucky, 106 S. Ct. 1712 (1986)	passim
Beck v. Alabama, 477 U.S. 625 (1980)	passim
Brooks v. Tennessee, 406 U.S. 605 (1972)	11
California v. Brown, 107 S. Ct. 837 (1987)	22
Carlson v. Green, 446 U.S. 14 (1980)	23, 24
Eddings v. Oklahoma, 455 U.S. 104 (1982)	22
Fisher v. United States, 328 U.S. 463 (1946)	23
Franklin v. Lynaugh, petition for cert. granted, 56 U.S.L.W. 3287 (U.S. Oct. 9, 1987) (No. 87-5546)	21, 23-24
Hopper v. Evans, 456 U.S. 605 (1982)	7, 11
Illinois v. Gates, 462 U.S. 213 (1983)	23
Jurek v. Texas, 428 U.S. 262 (1976)	6, 21, 23
Lefkowitz v. Cunningham, 431 U.S. 801 (1977)	11
Lockett v. Ohio, 438 U.S. 586 (1978)	22
Norris v. Alabama, 294 U.S. 587 (1935)	19
People v. Turner, 42 Cal. 3d 711, 726 P.2d 102, 230 Cal. Rptr. 656 (1986)	20
Simmons v. United States, 390 U.S. 377 (1968)	11
State v. Butler, 731 S.W.2d 265 (Mo. Ct. App. 1987)	20

Texas v. Chambers, 688 S.W.2d 483
(Tex. Crim. App. 1984), cert. denied,
474 U.S. 864 (1985) 24

Texas Dept. of Community Affairs v. Burdino,
450 U.S. 248 (1981) 19

Tompkins v. Texas, __ S.W.2d __, No. 68,870,
slip op. (Tex. Crim. App. Oct. 7, 1987) 4

United States v. Salvucci, 448 U.S. 83
(1980) 11

Vickers v. Ricketts, 798 F.2d 369
(9th Cir. 1986) (Kennedy, J.) 7, 8

Federal Statutes:

28 U.S.C. § 1257(3) (1982) 2
28 U.S.C. § 2106 (1982) 24

Tex. Code Crim. Proc. Ann. art. 37.071
(Vernon 1974) 2

Tex. Penal Code Ann. (Vernon 1974)
§ 6.03 ..... 2, 9
§19.02 ..... 2, 12
§19.03 ..... 2, 7, 12
§19.05 ..... 2, 9
§19.07 2

Text:

R. Stern, E. Gressman, S. Shapiro,
Supreme Court Practice, (6th ed. 1986) 24

Appendices:

Appendix A: Opinion of Texas Court of Criminal Appeals

Appendix B: Denial of Petitioner's Motion for Rehearing

Appendix C: Findings of the 230th Judicial District Court of Harris County, Texas

Appendix D: Tex. Code Crim. Proc. Ann. art. 37.071, Tex. Penal Code Ann. §§ 6.03, 19.02, 19.03, 19.05, 19.07

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

No. _____

PHILLIP D. TOMPKINS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

Phillip D. Tompkins respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (the "court of appeals"), the denial of Petitioner's motion for rehearing by the court of appeals, and the findings of the 230th Judicial District Court of Harris County, Texas (the "district court") following the Batson hearing, are attached as Appendices A, B and C, respectively.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals, affirming petitioner's conviction for capital murder and his sentence of death was entered on October 21, 1987. A

timely motion for rehearing was denied on November 12, 1987. On January 5, 1988, Justice White extended the time for filing this petition to and including February 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The case also involves the following Texas statutes: Art. 37.071 of the Texas Code of Criminal Procedure; and Sections 6.03, 19.02, 19.03, 19.05, & 19.07 of the Texas Penal Code. The text of these statutes appears in Appendix D.

STATEMENT OF THE CASE

1. The Case. On June 11, 1981, petitioner was convicted by a jury of capital murder under Section 19.03(a)(2) of the Texas Penal Code, intentional murder committed in the commission of a robbery or kidnapping. Under Texas law, a person convicted of capital murder may be sentenced to death only if the jury answers two statutory questions in the affirmative at the conclusion of the sentencing phase of trial. The two questions are (1) "whether the conduct of the defendant that caused the death of the deceased was deliberate," Art. 37.071(b)(1) (the "first question"), and (2) "whether there is a probability that the defendant would commit criminal acts of violence [in the future]", Article 37.071(b)(2) (the "second question"). A "no" answer to either question results in a sentence of life imprisonment. If both questions are answered in the affirmative, the death penalty is mandatory. See Tex. Code Crim. Proc. Ann. art. 37.071(e).[1]

[1] There is a third statutory question that is asked in some cases, but that question was not applicable here. See Tex. Code Crim. Proc. Ann. art. 37.071(b)(3).

The jury in this case returned affirmative answers to both questions and the trial judge assessed the petitioner's punishment at death.

The Texas Court of Criminal Appeals affirmed the conviction and sentence but stayed the execution of the mandate until January 28, 1988. On February 3, 1988, Justice White further stayed the execution of the mandate pending the filing, consideration, and disposition of this petition.

2. The Facts. Petitioner's conviction was based on circumstantial evidence. He did not testify on his own behalf and presented no direct evidence in his defense. The prosecutor's evidence established that the deceased, Mary D. Berry, was seen leaving work late on the evening of January 25, 1981. R. Vol. XVIII at 30-31.[2] Several hours later, her car was found abandoned at a Houston intersection with its lights on and its engine running. Her body was found on the morning of January 27, 1981, bound and gagged and tied to a tree. R. Vol. XX at 334-378, 422-442. The cause of death was determined to be suffocation from the cloth gag that had been placed in her mouth. R. Vol. XXII at 737. The deceased had not been otherwise physically or sexually abused. R. Vol. XXII at 714-747.

Several days later, various items of property belonging to the deceased were found in petitioner's possession, including her automatic bank card. R. Vol. XXII at 732, 783, 784. Petitioner was identified from photographs taken by a camera at a branch of the deceased's bank, as having used the bank card between the time the deceased was seen leaving work and the time her body was discovered. R. Vol. XVIII at 129, Vol. XIX at 231, 235-241. A bed sheet and electrical cord that had been used to bind and gag the

[2] Citations are to the record on appeal at the Texas Court of Criminal Appeals.

deceased were also linked to petitioner. R. Vol. XXII at 847.

3. Failure to Instruct on Lesser Included Offenses. Petitioner was charged and convicted of capital murder under Section 19.03(a)(2) of the Texas Penal Code. That section defines the offense as "intentional[ ] . . . murder in the course of committing or attempting to commit the offenses of kidnapping . . . [or] robbery." At the conclusion of the evidence, petitioner requested that the jury be instructed on the lesser included offenses of felony murder, involuntary manslaughter and criminally negligent homicide. These non-capital offenses differ from capital murder in that they do not require a finding of intentional killing. Petitioner argued that instructions on the lesser offenses were warranted because the jury could infer from the evidence that the petitioner had not intended to kill the deceased when he left her bound, gagged, and tied to a tree. Tompkins v. Texas, __ S.W.2d __, No. 68,870, slip op. at 140 (Tex. Crim. App. Oct. 7, 1987) (hereinafter cited as "Tompkins at ___."). The district court refused to instruct the jury on these lesser included offenses. R. App. at 187-91.

On appeal, petitioner argued that the district court's failure to instruct on the lesser included offenses violated his due process rights as explained by this Court in Beck v. Alabama, 477 U.S. 625, 637 (1980).[3] Tompkins at 140. However, the Texas Court of appeals affirmed the decision of the district court, concluding that there was no evidence from which the jury could have concluded that the killing of the deceased was unintentional. Tompkins at 140. The court

[3] Petitioner's appeal focused on the failure to instruct on involuntary manslaughter and criminally negligent homicide. The district court's failure to instruct on felony murder -- also a noncapital offense -- was not raised by petitioner on appeal.

of appeals distinguished Beck on the grounds that in Beck the defendant testified and produced evidence that would have justified a conviction for the lesser offenses, whereas here the defendant did not testify or present any evidence. Tompkins at 140.

4. The Batson Issue: Petitioner is black. During the voir dire of prospective jurors the prosecution exercised its challenges and peremptory challenges to exclude all 13 prospective black jurors. (Eight of the 13 prospective black jurors were challenged for cause and the remaining 5 were peremptorily challenged.) Petitioner moved to quash the jury on the ground that the prosecution had used its peremptory challenges in a discriminatory manner to purposely exclude prospective jurors on the basis of race. Tompkins at 112. The district court denied the motion to quash. Id.

Petitioner's case was pending on appeal when this Court decided Batson v. Kentucky, 106 S. Ct. 1712 (1986). Petitioner's appeal was abated and the case was returned to the trial court with instructions to conduct a Batson hearing. The Batson hearing was held on June 3 and 4, 1987.

At the Batson hearing the district court found that petitioner's prima facie showing of discrimination was rebutted by neutral non-racial explanations offered by the prosecution for its peremptory challenges of the prospective black jurors. See Appendix C.

Although the Texas Court of Criminal Appeals found the prosecution's explanations for the peremptory challenges suspect on their face, it refused to "substitute [its] judgments of witness' credibility . . . for those of the factfinder," Tompkins at 118, and affirmed the trial court's Batson findings. In so doing, the court of appeals refused to consider objective evidence in the record which demonstrated that the purportedly disqualifying

characteristics that formed the basis of the prosecution's neutral explanations for its challenges of black prospective jurors were also present with respect to white jurors who were not challenged. Although the court of appeals acknowledged that this evidence "cast considerable doubt upon the neutral explanations offered by counsel for the state," Tompkins at 119 n.6A, it refused to consider the evidence because petitioner had not drawn these comparisons for the trial judge at the Batson hearing. Id. The court of appeals' refusal to consider petitioner's juror comparison was inexplicable since the court itself relied on a similar juror comparison to reject the State's explanation for one of the challenges.

5. Challenge to the Constitutionality of the Texas Capital Sentencing Scheme. Prior to trial, petitioner moved to quash the indictment on the ground that the capital sentencing procedures in Texas, Tex. Code of Crim. Proc. Ann. art. 37.071, were unconstitutional in light of the standards applicable to capital sentencing procedures as articulated by this Court in cases decided after Jurek v. Texas, 428 U.S. 262 (1976). See R. Vol. IV at 9-31. The district court denied the motion to quash without opinion. Id. at 31. Petitioner's court appointed counsel did not renew this constitutional challenge on appeal.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURT OF CRIMINAL APPEALS MISAPPLIED THIS COURT'S DECISION IN BECK v. ALABAMA

In Beck v. Alabama, 447 U.S. 625 (1980), this Court held that, where the evidence in a capital case would support a verdict of guilty of a lesser included noncapital offense, due process requires that the jury be instructed regarding that offense. Id. at 637. See also Hopper v. Evans, 456 U.S. 605, 609 (1982); Vickers v. Picketts, 798 F.2d 369, 371 (9th Cir. 1986) (Kennedy, J.). "[W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." Beck v. Alabama, 447 U.S. at 637.

Petitioner was charged with capital murder under Section 19.03(a)(2) of the Texas Penal Code -- intentional murder committed in the course of kidnapping or robbery. Although petitioner did not testify or present any direct evidence, he argued that he was entitled to instructions on the lesser included noncapital offenses of involuntary manslaughter and criminally negligent homicide, both of which are forms of unintentional killing. Petitioner's thesis was that the evidence that he bound and gagged the deceased and left her tied to a tree did not inescapably lead to the conclusion that he intended the deceased to die. Petitioner argued that because the jury might infer from the prosecution's evidence that he did not intend to kill the deceased, he was entitled to instructions on the lesser included offenses as a matter of due process.

The court of appeals concluded that instructions on the lesser included offenses were not warranted because there was no evidence from which the jury could conclude that petitioner did not intend to kill the deceased. In so doing, the court distinguished Beck on the grounds that "[i]n Beck, supra, the defendant testified at trial and denied that he killed his victim or intended his victim's death, whereas here [petitioner] did not testify or present any evidence from any source that he possessed only the intent to either rob or kidnap [the deceased]." Tompkins at 140.

The court of appeals erred in two respects First, its conclusion that there was no evidence in the record that would support the lesser included offenses is not supported by the record, and the court's analysis of this point is internally inconsistent. Second, the basis on which the court of appeals distinguished Beck ignores the logic of Beck and raises serious constitutional issues not addressed in Beck.

1. The court of appeals erred in concluding that there was no evidence that would support the lesser included offenses: The evidence at trial "unquestionably [established] that [petitioner] was guilty of a serious, violent offense, but [left] some doubt as to an element that would justify conviction of a capital offense" --petitioner's intent to kill decedent. Vickers v. Ricketts, 798 F.2d at 371. This doubt was created by a number of factors: First, the evidence was entirely circumstantial. Second, there was evidence showing that petitioner bound and gagged the deceased but did not otherwise physically abuse her, which inherently raised a question regarding his intent to kill her. Third, there was evidence that petitioner left some slack in binding decedent's hands and feet "that would have allowed some movement of the victim's knees and shoulders."

Tompkins at 136. And finally, "[t]here was . . . evidence [scuff marks up and down on the tree] . . . from which . . . one might infer that the victim had attempted to escape," i.e., was alive for some period of time, after having been tied to the tree. Id. at 136-137.

This evidence "would permit a jury rationally to find [petitioner] guilty of the lesser included offense" of involuntary manslaughter, or criminal negligence, and "acquit him of [capital] murder." Beck v. Alabama, 447 U.S. at 635.

Involuntary manslaughter is committed by a defendant "recklessly" causing the death of another. Tompkins at 140, citing Tex. Penal Code Ann. § 19.05(a)(1), App. D. "Recklessly" is defined as being aware of the risk and acting in conscious disregard of that risk. Tex. Penal Code Ann. § 6.03(c). The jury could reasonably have inferred from the evidence that the petitioner recklessly caused the deceased's death, i.e., that he was aware of the risk that leaving the deceased bound and gagged could lead to her death and that he consciously disregarded that risk. If so, the jury could have convicted the petitioner of involuntary manslaughter.

Criminally negligent homicide is committed when one causes the death of another as a result of "criminal negligence." Tex. Penal Code Ann. § 19.07. "Criminal negligence" occurs when a person "ought to be aware of a substantial . . . risk . . . ." and negligently "fail[s] to perceive it." Tompkins at 138, citing Tex. Penal Code Ann. § 6.03(d) (emphasis added). The jury could reasonably have concluded that the petitioner "ought [to have been] aware" of the risk that leaving the deceased bound and gagged could lead to her death and that he negligently failed to perceive it. If so, the jury could have convicted the petitioner of criminally negligent homicide.

The court of appeals erred in concluding that there was no evidence that would have supported either of these offenses. The court examined each offense and concluded that criminally negligent homicide required that petitioner be unaware of the risk and that involuntary manslaughter required that petitioner be aware of the risk. The court then concluded that there was no evidence from which the jury could conclude that the accused was unaware of the risk created by his conduct, thereby negating criminally negligent homicide. Tompkins at 138. The court then concluded that there was no evidence that the defendant's conduct was "reckless," or that he was aware of the risk, thereby negating involuntary manslaughter. Tompkins at 139-40. The court's reasoning is internally inconsistent.

As Judge Clinton noted in his dissent:

> First the majority says appellant's conduct precludes an inference "that he was then unaware of the risk his conduct created . . . .So much for criminally negligent homicide. Next, it says "without evidence that appellant acted recklessly in causing the death of his victim [involuntary manslaughter was not raised]" . . . .But the majority had just found appellant was aware of the risk [i.e., the definition of reckless conduct].

Tompkins at 161 n.1. Stated differently, if the logic inescapably takes the case out of negligent homicide, that same logic inescapably brings the case within involuntary manslaughter, and vice versa, i.e., if the accused was aware of the risk then he acted "recklessly." If he "ought to have been aware" of the risk, but was not, he acted "negligently."

2. The court of appeals misread Beck: After erroneously finding that there was no evidence that would have warranted instructions on the lesser included offenses, the court of appeals sought to distinguish this case from Beck stating: "[W]e find that Beck, supra is factually

distinguishable from the instant case. In Beck . . . the defendant testified at trial and denied that he killed his victim or intended his victim's death, whereas here appellant did not testify or present any evidence from any source that he possessed only the intent to either rob or kidnap Berry." Tompkins at 140.[4] The court seriously misread Beck.

The logic of Beck has nothing to do with whether the defendant testified or presented evidence. Beck holds that, in a capital case, due process requires that the jury must be given a "third option" to convict for a noncapital offense whenever there is evidence that would support a finding of guilty on a lesser offense. The source of that evidence is irrelevant to the rationale of Beck.

Even more troubling is the court's apparent reading of Beck to require that the defendant testify or present evidence in order to receive the protections of Beck. Applying Beck in this manner would create the "intolerable" result that "one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394 (1968). Accord, United States v. Salvucci, 448 U.S. 83, 89-90 (1980); Lefkowitz v. Cunningham, 431 U.S. 801, 806-07 (1977); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972).

Although Beck does not require that lesser included offense instructions be given in every capital case, see Hopper v. Evans, 456 U.S. at 610, it does require "that the jury be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict.'" Id. As discussed above, there was evidence in this case that would have

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4 "It appears that had appellant's written confession been admitted into evidence, the issue that appellant presents might call for a conclusion different from the one we reach." Tompkins at 137 n.7.

supported a verdict of guilt on the lesser offenses of involuntary manslaughter or criminally negligent homicide. Under Beck petitioner was, therefore, entitled to instructions on these lesser offenses as a matter of due process. In the absence of such instructions, the jury was not given the option of deciding "whether to infer recklessness or negligence or intent to kill . . . .[T]he jury was permitted only to convict of capital murder or to acquit." (Emphasis added.) Tompkins at 169, Clinton, J., dissenting. This is precisely the situation that Beck found constitutionally intolerable.

It should be noted that the trial court did instruct the jury on the lesser offense of intentional murder, Tex. Penal Code Ann. § 19.02(a)(1), which is a noncapital offense.[5] See R. App. at 187-91. Intentional murder differs from capital murder in that capital murder requires proof that the intentional murder was committed in the course of a robbery or kidnapping. See Sections 19.03(a)(2) and 19.02(a)(1), Texas Penal Code.

The court's instruction on intentional murder did not, however, give the jury a viable "third option" to convicting the petitioner of capital murder or acquitting him. The jury could reasonably have convicted petitioner of intentional murder only if it found that he had intentionally killed decedent but had not robbed or kidnapped the deceased. Such a finding would have been unsupportable by the evidence; if the jury found that petitioner had intentionally killed the deceased by gagging her and tying her to a tree, they could not fail to find that he had robbed or kidnapped her.

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5 The court refused petitioner's request for an instruction on felony murder which is a noncapital offense. Tex. Penal Code Ann. § 19.02(a)(3). See R. App. at 172-75. Felony murder is killing another by conduct "clearly dangerous to human life" in the commission of a felony. Tex. Penal Code Ann. § 19.02(a)(3).

The only real issue presented by the evidence was whether defendant intended to kill decedent; on this point, the jury was given only two options: find the petitioner guilty of having intentionally killed the deceased (a capital offense when coupled with robbery or kidnapping) or acquit the petitioner of killing the deceased (an unlikely result given the evidence linking the petitioner to the materials used to bind and gag the deceased). The jury was given no "third option."

Finally, even if the noncapital murder charge could reasonably be seen as a viable third option in this case, due process would require that a jury in a capital case be instructed as to each lesser included offense that the evidence would support. The concerns regarding the reliability of a capital verdict that underlay Beck are equally present where the jury is instructed as to some but not all of the potentially applicable lesser included offenses.

Because the court of appeals erred in concluding that petitioner was not entitled to instructions on the lesser included offenses and seemingly misinterpreted this Court's holding in Beck v. Alabama, this case raises important issues that this Court should address. The writ should be granted on issue number 1.

II. THE APPROACH ADOPTED BY THE TEXAS COURT OF CRIMINAL APPEALS IN ACCEPTING THE DISTRICT COURT'S BATSON FINDINGS WOULD, IF ACCEPTED, VITIATE THIS COURT'S DECISION IN BATSON v. KENTUCKY

This case presents an important issue relating to the proper administration of the protections sought to be achieved by this Court in Batson v. Kennedy, 106 S. Ct. 1712 (1986). The Court should review this issue here because the approach adopted by the Texas Court of Criminal Appeals to evaluate the prosecution's purportedly neutral explanations for its peremptory challenges of prospective black jurors would, if accepted, vitiate the protections of Batson.

Here the court of appeals deferred to the district court's acceptance of the prosecutor's explanations as a matter involving witness credibility, even though the court of appeals found the explanations to be implausible on their face. In so doing, the court expressly refused even to consider other objective evidence in the record that "cast considerable doubt" on the prosecutor's explanations and which, if considered, could have "materially affected" the court's decision. Tompkins at 119, n.6A. Unless appellate courts are prepared to look to all the circumstances evident in the record to see if -- despite the State's proffered explanations -- discrimination has taken place, the promise of Batson will be illusory.

In Batson, this Court confirmed that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." 106 S. Ct. at 1717. Batson recognized that the defendant's right to equal protection also forbids the prosecution to exercise peremptory challenges to exclude potential jurors solely on account of their race. Id.

Under Batson, once a defendant has established a prima facie case of purposeful discrimination, by showing that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, the prosecution must provide neutral non-racial explanations for its challenges.

Petitioner established a prima facie case here -- he is black and the prosecution exercised its challenges for cause and its peremptory challenges to exclude all 13 prospective black jurors. (Eight of the jurors were challenged for cause and five were peremptorily challenged.) The prosecution then proffered explanations for its challenges. The district court accepted these explanations. Although the court of appeals found the prosecutor's explanations implausible on their face, it nonetheless affirmed the district court's findings.

The prosecution offered the following explanations for its peremptory challenges of venirepersons Thomas, Samuel and Green, all of whom are black. The prosecutor struck prospective juror Thomas because he found that she had problems with the "law of circumstantial evidence" and "[t]hat was my whole case. We had no direct evidence." Tompkins at 122. The court of appeals found this explanation " . . . shocking and totally not understandable," since, at the time the challenge was exercised, the prosecution had petitioner's confession which had not been suppressed, id., and conceded that "[w]ithout more . . . we would have to hold that only an irrational trier of fact could have accepted this reason as a 'neutral explanation' why he used a peremptory strike on the juror." Id. Although the court found nothing that altered the fact that the prosecutor's explanation was implausible -- his case was not wholly

circumstantial at the time he exercised the challenge, it nonetheless affirmed the district court's finding.

Juror Green was struck because (1) he had worked in the U.S. Postal Service for thirteen and a half years; (2) he did not articulate answers; and (3) he responded by nodding his head (although he was never asked for a verbal response). Tompkins at 124. The court of appeals conceded that it had "some difficulty understanding the relevancy of a venireperson's employment as a postman . . . ," Tompkins at 125, and found Mr. Green's purported inarticulateness to be an insufficient reason for the challenge, noting that Mr. Green did not indicate an inability to be articulate "that was any greater or less than the unchallenged venirepersons." Id. at 124. Despite concluding that the State's explanations for challenging Mr. Green "give us great concern," id., the court of appeals affirmed the trial judge's acceptance of the State's explanations for challenging Mr. Green. Tompkins at 125.

Finally, the State challenged juror Samuel because his data sheet appeared to have been filled out by someone else, suggesting that he was illiterate, although there was no proof of this, and because he nodded his head in response to questions. Supp. R., Vol. I (Batson hearing) at 134-43, 146. The court of appeals accepted this challenge on the basis of the prosecutor's assertion that he was concerned that Mr. Samuel might be illiterate and that this was a "complex case" and would involve written jury instructions. Tompkins at 124.

The court of appeals also had before it, but refused to consider, a juror comparison that demonstrated that the prosecution's already suspect explanations were implausible. This comparison, presented to the court in petitioner's supplemental brief, showed that white jurors who

were not challenged possessed the same purportedly undesirable characteristics that formed the basis of the prosecution's purportedly neutral explanations of its challenges to prospective black jurors. Tompkins at 119, n.6A.

While conceding that this comparison "cast considerable doubt" on the prosecutor's explanations and "might have materially affected" the court's decision, the court refused to consider the comparison on the ground that petitioner had not asked the district court to make such a comparison at the Batson hearing. Id. The court's refusal to accept the comparison was incorrect and inconsistent with other parts of its opinion. Petitioner's comparison was not new evidence; it was simply an argument based on evidence in the record. Moreover, the court of appeals relied on precisely such a comparison itself to reject one of the prosecution's explanations for its challenge of Mr. Green.[6]

In affirming the district court's Batson findings, the court of appeals approached the issue as essentially one of witness credibility and deferred to the district court's findings. Observing that "the trial judge believed the race-neutral explanations given by [the prosecutors]," Tompkins at 126, and that such determinations are entitled to great deference, Tompkins at 117, the court affirmed the trial court without consideration of petitioner's arguments based on juror comparisons. Tompkins at 126. In so doing, the court of appeals relied heavily on this Court's observation in Batson that, since Batson findings typically turn on the credibility of the witness testimony, "a

---

[6] As noted above, one of the prosecutor's explanations for its challenge of Mr. Green was that he was inarticulate. The court found this explanation implausible on the basis of its own juror comparison, noting that Mr. Green did not indicate an inability to be articulate "that was any greater or less than the unchallenged venirepersons." Tompkins at 124.

reviewing court ordinarily should give [the trial court's Batson] findings great deference." Batson at 1724, n.21.

The problem with the court of appeals' approach was that this case did not involve just witness credibility. There was also objective evidence, which the court did not consider in its review, that "cast considerable doubt" on the prosecution's explanations. Tompkins at 119 n.6A. This Court's observations on the deference to be accorded findings on witness credibility certainly were not intended to be a signal to appellate courts that they were free to ignore circumstances evident in the record that cast doubt on the prosecutor's explanations. Unless appellate courts are willing to examine the plausibility of the State's Batson explanations in light of the entire record, the promise of Batson -- to serve as a check on the discriminatory use of peremptory challenges by prosecutors -- will be illusory.

Clearly, the Court anticipated the need for appellate courts to weigh the plausibility of the prosecutor's explanation in light of all the circumstances in the record. As Justice Marshall observed in Batson, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror." Batson at 1728. It is particularly important, therefore, that the plausibility of such explanations be examined on the basis of all of the circumstances in the record. This is particularly necessary in the Batson context, where the review of the prosecutor's explanations is intended to act as the safeguard of defendant's fundamental right to equal protection. It becomes even more essential where, as here, the Batson hearing took place almost 6 years after the petitioner's conviction, and several of the prosecutor's explanations are facially suspect. In such circumstances, the prosecutor's explanation of his reasons for a challenge should be accepted

less readily, particularly where it is internally inconsistent and is contradicted by objective evidence in the record.

This Court has already sown the seeds for requiring meaningful review in Batson cases. In Batson, the Court stated that, while the prosecution's explanations need not rise to the level of a challenge for cause, "the prosecutor may not rebut the defendant's prima facie case . . . merely by denying that he had a discriminatory motive." Batson at 1723. As the Court in Batson noted, "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" Id. quoting Norris v. Alabama, 294 U.S. 587, 598 (1935). Therefore, "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." Batson, 106 S. Ct. at 1724 n.20, quoting Texas Dept. of Community Affairs v. Burdino, 450 U.S. 248, 258 (1981).

The court of appeals here did not subject the district court's Batson findings to the level of review that is required by Batson. On their face, the prosecution's explanations were not "'clear and reasonably specific' explanations of . . . 'legitimate reasons' for exercising the challenges." Id.

At the time Ms. Thomas was challenged for having problems with circumstantial evidence, circumstantial evidence was not crucial to the State's case, and the explanation for challenging Mr. Green, i.e., because he was a postal worker, is no explanation at all. It is comparable to an explanation rejected by another court where the prosecutor explained the exclusion of a nurse on the ground that nurses are compassionate for defendants. State v. Butler, 731 S.W.2d 265 (Mo. App. 1987). See also People v. Turner,

42 Cal. 3d 711, 726 P.2d 102, 230 Cal. Rptr. 656 (1986) (lack of intelligence ascribed to truck drivers not shown to apply to black truck driver who was removed). If a person may be struck because of his occupation without any explanation why the occupation is significant, a prosecutor can justify any exclusion merely by giving the person's occupation as the reason.

At a minimum, Batson findings, like any other findings of fact, are subject to a "clearly erroneous" review. The credibility of witnesses is only one factor to be considered in such a review. Under a "clearly erroneous" standard, the reviewing court should hold the finding erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the firm conviction that a mistake has been committed." Anderson v. Bessemer City, 470 U.S. 564 (1985).

The court of appeals here did not conduct its review based on the entire record and, as a consequence, failed properly to administer the protections that Batson sought to guarantee.

III. AS APPLIED, THE FIRST AND SECOND CAPITAL SENTENCING QUESTIONS IN TEXAS DO NOT SATISFY THE CONSTITUTIONAL REQUIREMENTS FOR CAPITAL SENTENCING PROCEDURES ARTICULATED BY THIS COURT IN CASES DECIDED SINCE JUREK

This case also presents an issue identical to the issue currently before this Court in Franklin v. Lynaugh, petition for cert. granted, No. 87-5546 (certiorari granted October 9, 1987) -- whether the first and second Texas sentencing questions provide constitutionally adequate sentencing guidance in light of the requirements for capital sentencing procedures articulated by this Court in cases decided after Jurek v. Texas, 428 U.S. 262 (1976).

After the jury found petitioner guilty of capital murder, it heard evidence in mitigation and aggravation prior to sentencing. At the conclusion of the sentencing evidence, the jury received no sentencing instructions other than receiving, in written form, the first and second Texas sentencing questions:

> Issue No. 1
>
> Do you find from the evidence beyond a reasonable doubt whether the conduct of the defendant, Phillip Daniel Tompkins, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Answer: _____
>
> Issue No. 2
>
> Do you find from the evidence beyond a reasonable doubt whether there is a probability that the defendant, Phillip Daniel Tompkins, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Answer: _____

R. App. at 202.

As in Franklin, these instructions did not permit the jury to consider relevant mitigating evidence presented

by petitioner that could have justified a sentence less than death.

Petitioner presented evidence that he came from a broken home, that his mother was not supportive, that he had raised his eight brothers and sisters without a father in his house, and that he had helped to support and protect his family at a young age. R. Vol. XXV at 1203-1211. There was also evidence that Petitioner is of low intelligence (I.Q. of 80) and has emotional problems stemming from his mother's lack of support. R. Vol. XXVI at 1243-1248. Such mitigating evidence is highly relevant in capital sentencing. California v. Brown, 107 S. Ct. 837, 841 (1987) (O'Connor, J. concurring).

This Court has held "that a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background." Id., citing Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978). Nothing in the first two Texas questions informed the jury that it could consider such evidence or the effect, if any, that such evidence could be given.

A juror could reasonably have concluded that the fact that petitioner helped raise his eight siblings in a broken home was not relevant to either of the two narrow questions asked. If so, the juror would be permitted to ignore this evidence altogether. Indeed, since the inquiry was focused solely on the two specific questions asked, a juror could reasonably have concluded that he or she was precluded from considering evidence not directly relevant to either question. Finally, even if the juror wanted to consider such evidence and felt on balance that it justified a sentence less than death, the two questions do not permit the juror to give the evidence any effect. Under the Texas

scheme, a juror has no means of expressing the view based on mitigating evidence, not directly relevant to either question, that a sentence of less than death is appropriate.

Thus, this case presents precisely the same issue that is before the court in Franklin v. Lynaugh. The petitioner in Franklin frames this issue in its brief as follows: "Did jury instructions given pursuant to article 37.071(b) of the Texas Code of Criminal Procedure deprive the jury of any procedure for considering and expressing the conclusion that the mitigating evidence called for a sentence less than death?"

In the district court, petitioner moved to quash the indictment on the ground that Article 37.071 of the Texas Code of Criminal Procedure -- the Texas capital sentencing procedure -- is unconstitutional because, as applied, it fails to meet the constitutional requirements for capital sentencing procedures articulated by this Court in cases decided since Jurek v. Texas, 428 U.S. 262 (1976). See P. Vol. IV at 9-31. The trial court denied petitioner's motion without opinion. Id. at 31. Petitioner's court appointed counsel did not, however, renew this constitutional challenge on appeal.

This Court has recognized that it has the power, in appropriate cases, to decide important questions not raised by the parties below once its jurisdiction is otherwise established, Illinois v. Gates, 462 U.S. 213, 219-20 (1983); see also Carlson v. Green, 446 U.S. 14, 17 n.2 (1980), particularly where, as here, material errors were not raised below in a capital case, Fisher v. United States, 328 U.S. 463 (1946), and the issue is presented in a case that is

already pending. Carlson v. Green, 446 U.S. 14, 17 n.2 (1980).[7]

Because the same issue is already before the Court in Franklin, however, the Court may prefer to defer consideration of the petition with respect to this issue pending its decision in Franklin.

Should this Court reverse Franklin, the Texas Court of Criminal Appeals will apply the benefits of Franklin to this case, even though this issue was not raised in the court of appeals by petitioner here. See Texas v. Chambers, 688 S.W.2d 483 (Tex. Crim. App. 1984), cert. denied, 474 U.S. 864 (1985). As a consequence, it may be appropriate for this Court to hold the petition on this third issue until Franklin is decided and to return this case to the Texas courts for further consideration in light of its decision in Franklin. Such a disposition of this case would be in the interests of justice and of efficient judicial administration and would obviate the need for petitioner to pursue further post-conviction proceedings in the Texas state courts, pending the disposition by this Court of Franklin.

This Court has the authority to hold this case pending the disposition of Franklin under its general grant of authority to dispose of cases as the interests of justice require and in the manner most consistent with efficient judicial administration. See 28 U.S.C. § 2106 (1982); see also R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice at 366 (6th ed. 1986).

[7] The Court plainly has jurisdiction over the first two issues presented in this petition. Both raise important constitutional issues and were properly raised below.

CONCLUSION

The Petition for Writ of Certiorari should be granted. In the alternative, the Court may wish to defer the disposition of the petition pending its decision in Franklin v. Lynaugh, No. 87-5546 (certiorari granted, October 9, 1987).

Respectfully submitted,

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Dated: February 10, 1988

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

PHILLIP D. TOMPKINS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

APPENDIX

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APPENDIX
TABLE OF CONTENTS

Appendix A: Opinion of Texas Court of Criminal Appeals

Appendix B: Denial of Petitioner's Motion for Rehearing

Appendix C: Findings of the 230th Judicial District Court of Harris County, Texas

Appendix D: Tex. Code Crim. Proc. Ann. art. 37.071, Tex. Penal Code Ann. §§ 6.03, 19.02, 19.03, 19.05, 19.07

APPENDIX A

TC-87-30-111

PHILLIP DANIEL TOMPKINS, Appellant

NO. 68,870 VS. - - - APPEAL FROM HARRIS COUNTY

THE STATE OF TEXAS, Appellee

OPINION

Phillip Daniel Tompkins, hereinafter appellant, was convicted by a jury of intentionally causing the death of Mary D. Barry while in the course of committing or attempting to commit the offenses of robbery and kidnapping of Barry, which elevated the offense of murder to capital murder. See V.T.C.A., Penal Code, Section 19.03 (2). After the jury answered in the affirmative the special issues that were submitted to it pursuant to Art. 37.071, V.A.C.C.P., the trial judge assessed appellant's punishment at death.

We affirm.

Appellant presents to this Court several "Issues for Review" in the two briefs that are in the record of appeal. For purposes of this appeal, we will refer to his "Issues for Review" as "Points of Error."[1] None of appellant's contentions challenge the sufficiency of the evidence on guilt or on any of the issues submitted on punishment. Appellant's points of error, which we group as follows, assert that he is entitled to a new trial because of the following: (1) the prosecuting attorneys selectively exercised their peremptory strikes on several black prospective jurors and fashioned their respective voir dire examination of the remaining black prospective jurors in such a manner so that all blacks would be prevented from serving as jurors in this cause; (2) the trial judge erred by not granting his motion to quash the indictment; (3) the trial judge erred in not

---

1/ Since the promulgation of the new Rules of Appellate Procedure, effective September 1, 1986, contentions in a death penalty case are now referred to as "points of error." See Tex.R.App.Proc. 74 (d), 210 (b). Previously, such were labeled "grounds of error." See Tex.R.Crim.Proc. 301; Art. 40.09 (9), V.A.C.C.P.

finding that a State's witness was, as a matter of law, his common law wife; (3) the trial judge erred in not instructing the jury on the lesser included offenses of involuntary manslaughter and criminally negligent homicide; (4) the trial judge erred in permitting a prison psychologist from the Commonwealth of Virginia to testify against him at the punishment stage of the trial; (5) the trial judge erred in not excluding at the punishment stage of the trial the testimony of two reputation witnesses from the Commonwealth of Virginia who testified for the State; (6) statements made by one of the prosecuting attorneys during her jury argument at the punishment stage of the trial were so egregious that they deprived appellant of a fair and impartial trial; and (7) this Court erred in refusing to grant his permission to file his original appellate brief that numbered 144 pages, which at the time it was submitted for filing exceeded the then existing maximum of 50 pages by 94 pages.

Finding that none of appellant's contentions merit this Court legally reversing his conviction, we will expressly overrule all of them and affirm the trial court's judgment of conviction and sentence of death.

Appellant first asserts that the trial judge erred in overruling his motion to quash the jury that had been selected in this cause because the State excluded by peremptory strikes five black veniremembers, thus depriving him of "his right to a trial by a jury of his peers which was truly representative of a cross-section of the community." Appellant relies upon the Constitutions of Texas, the United States, the Texas Code of Criminal Procedure, and case law from this Court and the Supreme Court of the United States as authority for his contention. The record reflects that appellant's motion to quash the jury was presented and overruled prior to the presentation of any evidence but after the jury had been selected to hear [illegible]

TOMPKINS - 3

At the time of appellant's trial, the law on the issue that appellant presents to this Court for review was governed by the Supreme Court decision of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). However, on April 30, 1986, while appellant's case was pending review by this Court, the Supreme Court of the United States in Batson v. Kentucky, 476 U.S.- , 106 S.Ct. 1712, 90 L.Ed.2d 69, 90 L.Ed.2d 69 (1986), overruled Swain, supra, "[t]o the extent that anything in Swain v. Alabama, supra, is contrary to the principles we articulate today. . ." 106 S.Ct. at 1725. [1] In Griffith v. Kentucky and Brown v. United States, 479 U.S.-, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the Supreme Court held that Batson, supra, applied to litigation pending on direct State or federal review or not yet final when Batson, supra, was decided on April 30, 1986, "with no exception for cases in which the new rule constitutes a 'clear break' with the past." However, the Supreme Court held in Allen v. Hardy, 476 U.S.-, -S.Ct.-, - L.Ed.2d- (1986), that Batson, supra, was not to be applied retroactively to a case then pending on federal habeas review. Thus, the issue that appellant presents must be decided pursuant to Batson, supra, and not Swain, supra.

---

[1] Although we, of course, cannot expressly state what motivated or caused the Supreme Court to reconsider the requirements it laid down in Swain, supra, in order to establish a prima facie case, we observe that many articles criticizing that decision had been previously written. See footnote 14 in Batson, supra. Also see Ginger, Jury Selection in Criminal Trials (1980 edition); Comment, "The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause," 46 U.Cin.L.Rev. 554 (1977); Comment: "A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process," 18 St. Louis U.L.Rev. 622 (1974); Comment: "Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury," 52 Va. L. Rev. 1157 (1966); Comment: "Fair Jury Selection Procedures," 75 Yale L.J. 322 (1966); Note: "Limiting the Peremptory Challenge: Representation of Groups of Petit Juries," 86 Yale L.J. 175 (1976); Note: 79 Harv. L. Rev. 135 (1965); Note: "Affirmative Selection: A New Response to Peremptory Challenge Abuse," 38 Stanford L.Rev. 781 (1986); "State v. Neil: The Peremptory Challenge Lives On, But For How Long?" 15 Stetson Law Rev. 515 (1986); the articles set out in 33 CrL 4068, footnote 1 (June 1, 1983), and the dissenting opinions filed by Justice Marshall, in which Justice Brennan joined, to the refusal of the Court to grant certiorari in Mc Cray v. New York; Miller v. Illinois; and Perry v. Louisiana (33 CrL 4067-4068 (June 1, 1983). Since Batson, supra, was decided, it, too, has caused scholars to analyse and interpret it, and in at least one instance to vigorously assail that decision. See Erickson, Neighbors, and George, United States Supreme Court Cases and Comments (1986 edition). However, objective articles have also been written. See "Batson v. Kentucky: The Court's Response to the Problem of Discriminatory Use of Peremptory Challenges," 36 Case Western Law Review 581 (1986); Belcuore, "Restricting Racially Motivated Peremptory Challenges", 34 Federal Bar News & Journal, January, 1987; Meyer, "Wheeler a Decade Later: The Revolution Continues", Forum, March/April, 1987; Udasham, "Batson v. Kentucky: a Defense Perspective", Summer 1987, Voice for the Defense.

TOMPKINS - 4

We believe that in order for the reader to fully appreciate what the Supreme Court stated and held in Batson, supra, it is necessary to briefly review what the Court stated and held in Swain, supra.

In Swain v. Alabama, supra, the Supreme Court reaffirmed the principle of law laid down in Strauder v. West Virginia, 10 Otto 303, 100 U.S. 303, 25 L.Ed.2d 664 (1880), and other cases, see those compiled in 106 S.Ct. at 1716, fn. 3, that a State may not purposefully exclude members of the black race from jury service solely because of their race. In Strauder, the State of West Virginia had passed a statute which permitted only white persons to serve as jurors, which the Supreme Court declared was unconstitutional. Although the Supreme Court reaffirmed in Swain, supra, the principle that a "State's purposefulness or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause," i.e., that prosecuting attorneys may not exclude members of the same race as the defendant from the jury venire on account of race or on the false assumption that members of the defendant's race as a group are not qualified to serve as jurors, it also held that "the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time. . ." 85 S.Ct. at 839. The Court also held that there was a presumption that the prosecuting attorney did not exercise his peremptory strikes on account of race or on the false assumption that members of the defendant's race as a group are not qualified to serve as jurors.

Based upon what the Supreme court had stated and held in Swain, supra, courts throughout the nation, including this Court, see, for example, Ridley v. State, 475 S.W.2d 769 (Tex.Cr.App.1972), also see the list of cases cited on page 51 of appellant's original brief, held that merely because no member of the defendant's race had ever served as a juror in a criminal case which the prosecuting attorney had

prosecuted was insufficient to establish a prima facie case of purposeful discrimination by that prosecuting attorney, i.e., in the instance where the defendant was black, to establish a prima facie case of purposeful discrimination by the prosecuting attorney, it was necessary for him to establish the repeated striking of blacks over a number of cases by the same prosecuting attorney before a prima facie case was established.

In Batson, supra, the Supreme Court, after concluding that the quantum of proof made necessary by Swain, supra, largely made prosecuting attorneys use of peremptory strikes immune from constitutional scrutiny, then set out a lesser burden of proof through which the defendant could establish a prima facie case of purposeful discrimination by the prosecuting attorney:

> To establish such a case, [that the prosecuting attorney had exercised his peremptory challenges on the basis of purposeful discrimination], the defendant first must show that he is a member of a cognizable racial group. . ., and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. . . [T]hese facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors raises the necessary inference of purposefulness discrimination. 106 S.Ct. at 1723.

If a prima facie case is established by the defendant, the prosecuting attorney's exercise of his peremptories to strike black persons would violate principles of equal protection of the law, unless he could come forward and demonstrate some "neutral"- non-race related- explanation, relating to the case to be tried, for excluding the prospective jurors. Batson, supra, held that to be acceptable the explanation need not, however, be equal to "cause" sufficient to justify a challenge to a juror for cause.[3] Thus, under Batson, supra, it is only when the defendant makes a prima facie showing that the burden then, and only then, shifts to the State to come forward with a neutral explanation why peremptory strikes were exercised on the black jurors who were struck. 106 S.Ct. at 1723.

3/ Batson, supra, does not concern the State challenging prospective black venirepersons for cause.

As previously pointed out, while appellant's case was under submission and pending review by this Court, the Supreme Court decided Batson v. Kentucky, supra. In light of Batson's evident impact upon appellant's above contention, on April 22, 1987, this Court in an unpublished opinion ordered the appeal abated to the trial court with instructions to the trial judge to conduct an evidentiary hearing and determine whether appellant had made a prima facie showing of purposeful discrimination and, if so, whether the prosecuting attorneys in this cause could offer a racially neutral explanation for using their peremptory strikes which is what we also did in Henry v. State, -S.W.2d (Tex.Cr.App.No. 1216-85, April 8, 1987); Keeton v. State, -S.W.2d- (Tex.Cr.App.No. 69,639, April 15, 1987); and Williams v. State, -S.W.2d- (Tex.Cr.App.No. 69,147, May 20, 1987).[4] The trial court has conducted the hearing, and the appellate record is now supplemented with a statement of facts of the hearing and written findings of fact and conclusions of law from the trial judge, a copy of which is attached to this opinion as "Appendix A". The trial judge found that appellant established a prima facie case "under Batson", and also found, implicitly, that the prosecuting attorneys did not exercise their peremptories against the five black venirepersons complained about solely on account of their race or on the assumption that black jurors as a group would be unable impartially to consider the State's case against appellant, who the record reflects is a member of the same race, and expressly found that the prosecuting attorneys gave neutral non-racial explanations for exercising peremptory challenges against the five black venirepersons, about which appellant complains.

Neither party challenges the trial court's finding that a prima facie case of purposeful discrimination was established by appellant, and we find that the record supports such a finding. Therefore, we have no occasion to consider whether appellant did, in fact, establish a prima facie showing of purposeful discrimination. Rather, we now turn to a review of the trial court's determination that the prosecuting attorneys did not use peremptory strikes for the purpose of excluding from jury service members of appellant's race.

4/ Also see De Blanc v. State, _____ S.W.2d _____, (Tex.Cr.App. No. 69,580, July 1,

The relative burdens of proof appropriate to the inquiry are given by Batson, supra, which we here excerpt and arrange in logical sequence:

> Once a defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. . . related to the particular case to be tried. [106 S.Ct. at 1723].
> . . . . . .
> If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. [106 S.Ct. at 1725].
> . . . . . .
> [If the prosecutor does come forward with such an explanation] [t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination. [106 S.Ct. at 1723-1724].
> . . . . . .
> Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. [106 S.Ct. at 1724, n. 21].

A prima facie case represents the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true. The party with the burden of proof must produce at least this much evidence to avoid a finding that the allegation is not true as a matter of law. Once produced, however, the allegation must be found true unless it is contradicted, impeached, or rebutted by other evidence. In the present context, such other evidence must include a racially neutral explanation by the prosecuting attorneys, and must be legally adequate to support a judgment in favor of the State. If it is, an issue of fact is joined which can only be resolved by an assessment of evidentiary weight and credibility. It is the burden of the accused to persuade the trial judge by a preponderance of the evidence that the allegations of purposeful discrimination are true in fact.[5]

---

[5] Support for the foregoing parargaph may be found in the following note from Batson, supra, 106 S.Ct. at 1721, n. 18, and the cases cited therein:

> "[D]ecisions in the context of Title VII [of the Civil Rights Act of 1964] 'disparate treatment' have explained the operation of prima facie burden of proof rules. See Mc Donnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. Texas [illegible] Community Affairs v. Burdine, supra, 450 [illegible] 101 S.Ct. at [illegible]."

Here, we are on much more familiar ground, for it is the sufficiency of evidence to support the proposition that we evaluate against a settled standard. Thus, where the accused has the ultimate burden to prove a factual allegation, such as purposeful discrimination in jury selection, by a preponderance of evidence, an appellate court must view the entire record in a manner favorable to the factfinder's determination and reverse only if no rational trier of fact could have failed to find his factual allegation true by a preponderance of evidence. See Van Guilder v. State, 709 S.W.2d 178 (Tex.Cr.App.1985), cert. denied, -U.S.-, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986); Schuessler v. State, 719 S.W.2d 320 (Tex.Cr.App.1986).

A trial judge, in determining whether a prospective juror has been challenged by the prosecution on a racial basis in violation of the United States Constitution, see Batson, supra, has an obligation to weigh the evidence and assess the credibility of witnesses.[6] In short, the trial judge is a factfinder. If from the evidence he believes that the prosecutor exercised peremptory strikes to exclude venirepersons based upon racial considerations, it is his duty to so find and to provide appropriate relief. This Court and the courts of appeals are principally reviewing courts. We do not substitute our judgments of witnesses' credibility and evidentiary weight for those of the factfinder, but affirm those judgments whenever the record discloses sufficient evidence in their support.

---

[6] Obviously, the prosecutor's testimony cannot alone be dispositive of the question. If he admits a racially motivated reason for exclusion, without more, the trial judge should never find otherwise. But if he denies any racial motive, the trial judge as factfinder must necessarily gauge the credibility of his testimony, determined in part, at least, by the plausability of his explanation. This task is no different in principle than any other factfinding enterprise.

At the "Batson" hearing that this Court ordered, see ante, though certainly afforded the opportunity to do so, appellant did not attempt to compare the five complained about black venirepersons with any of those venirepersons who were not challenged by the prosecution.6A/

Appellant, however, did establish that black jurors have been relatively uncommon on capital murder juries in Harris County during the past several years, but did not elicit any evidence that the Office of the District Attorney of Harris County, which appears contrary to the policy that the Office of the District Attorney of Dallas County once had, see Batson v. Kentucky, supra, Marshall, J., concurring opinion, 90 L.Ed.2d at 92, to exclude, through peremptory strikes, "Jews, Negroes, Dagos, Mexicans or a member of any minority race" from serving on a jury.

6A/ In a supplemental brief, filed on September 28, 1987, appellant has offered just such a comparison, inviting this Court to employ the record of jury selection that exists in this cause to impeach or rebut testimony given by the prosecutors at the "Batson" hearing, supra. The point is well-taken and does cast considerable doubt upon the neutral explanations offered by counsel for the State. Had the matter been pressed by defense counsel during his cross-examination of the prosecutors, or otherwise brought before the trial judge at the "Batson" hearing, it might have materially affected the trial judge's ultimate findings of fact.

However, even though the trial judge might have judicially noticed or independently recalled testimony from the jury selection process, there is nothing in the "Batson" hearing to suggest that she was requested by defense counsel to do so. In short, at the "Batson" hearing counsel for appellant gave no indication to the trial judge that he wanted her to consider the credibility of any neutral explanation offered by the State based upon the manner in which similarly-situated white veniremen were treated during voir dire.

We point out that, at a hearing conducted pursuant to Batson, the trial judge is the factfinder, and it is his responsibility to weigh the evidence and determine the credibility of the witnesses. A reviewing court should reverse his findings only when they are not supported by sufficient evidence or, as we often say, for an "abuse of discretion." Because the trial judge was not urged to make, and did not make, a finding based upon a comparison analysis in deciding the issue whether the prosecutors' neutral explanations were rebutted or impeached at the "Batson" hearing with evidence that unchallenged white veniremen also possessed the same purportedly undesireable characteristics, we do not consider this circumstance in reviewing the trial judge's findings in this cause.

As to the five black prospective venirepersons who were peremptorily struck by the prosecuting attorneys, we agree with the trial judge that the prosecuting attorneys articulated at the hearing racially neutral explanations, which were both plausible and unambiguous, for exercising their peremptories on the five complained about black venirepersons.

The prosecuting attorneys' testimony reflects that two of the five black venirepersons were struck because of their general opposition to the death penalty, although such beliefs would not have prevented or substantially impaired them from performing the office of juror. One of the two venirepersons also indicated that she might refuse to return a verdict unless appellant testified at trial. Thus, as to two of the five, there was an independent, non-racial basis for the prosecuting attorneys' decision to strike these two black venirepersons.

The prosecuting attorneys' testimony reflects that a third black venireperson, who in the course of her employment had been twice robbed at gunpoint, was excluded, by the prosecuting attorney's statement at the "Batson hearing", because she indicated serious reservations about returning a verdict of guilty based on circumstantial evidence alone.

Contrary to the complete memory of the attorneys for the respective parties who participated in the trial and at the "Batson hearing", and apparently the trial judge herself, the record reflects that when the trial judge ruled, after the pretrial hearing on appellant's motion to suppress appellant's confession had been held, as follows: "Your motion is denied as to the written confession. It is sustained as to the oral confession, to wit, the tape recordings that we heard the testimony in that regard." See Vol. VI of XXIV, page 67, of the Record. The record also reflects that thereafter, during the trial, the trial judge, after a Justice of the Peace from Travis County, who had testified at the pretrial hearing on appellant's motion to suppress, had testified in part, sua sponte excused the jury and then stated the following: "All right. Gentlemen, in view of Judge Herman's testimony and in view of the Supreme Court's decision in Edwards versus Arizona returned on May 18, 1981, which is approximately a month after we had a Jackson-Denno hearing in this case, I will reverse my prior ruling regarding your Jackson-Denno hearing and the Motion to Suppress the written confession of the defendant is granted." (Our emphasis.) See Vol. XXII of XXIX, stamped pages 767-768, printed pages 56-57, of the record.

Thus, when the prosecuting attorney conducted his voir dire examination of the above venireperson, he had appellant's written confession, which had been ruled by the trial judge to be admissible evidence, ready to be offered into evidence. This was certainly direct evidence, although it might be arguable as to how direct it was to all that needed to be proved in order to establish beyond a reasonable

doubt appellant's guilt of capital murder. Nevertheless, we find his statement that he gave at the "Batson hearing", in response to the question, "Q: Why was the law of circumstantial evidence so important at that particular time?", "A: That was my whole case. We had no direct evidence. . .", a little shocking and totally not understandable. Without more, we find that we would have to hold that only an irrational trier of fact could have accepted this reason as a "neutral explanation" why he used a peremptory strike on the juror.

There is more however. The voir dire examination of the above venireperson reflects that she was first questioned by the trial judge. One of the prosecuting attorneys, who testified at the "Batson hearing", then questioned the venireperson. He first covered with her such legal terms as "burden of proof" and "reasonable doubt", and then explained to her the elements of the offense of capital murder and murder, and the difference in punishment for capital murder and murder. The venireperson stated that if she found a defendant guilty of murder she could consider the entire range of punishment for that offense. He then explained to her the elements of the alleged underlying felony offenses and intent. He then covered with her the law of parties and motive. During the questioning, the venireperson stated that "All I want to know if he was there at the time or if he actually did it." The prosecutor then covered the legal term "presumption of innocence" and the right of the accused not to testify. He then covered the punishment stage where the defendant has been found guilty of capital murder, and the special issues that the jury would answer. The prosecutor also asked the venireperson what the term "deliberately" meant to her, and ascertained that she would not automatically answer the special issues in the affirmative simply because she had found the defendant guilty of capital murder, and would answer them based upon the evidence presented. The prosecuting attorney then questioned the venireperson about her understanding of direct versus circumstantial evidence. When asked, whether "in the proper case can you apply the law of circumstantial evidence in a capital murder case?", "Can you find someone guilty of capital murder based on what we call - you know, we have got to put a label on

everything - not direct evidence, but circumstantial evidence?", the venireperson responded: "I don't think so." The trial judge then questioned the venireperson, using the example "Nobody saw him get into the cookie jar" to describe the meaning of the legal term "circumstantial evidence". Finally, the venireperson stated that she could not apply the law of circumstantial evidence to a capital murder case. However, she also stated that she could find someone guilty based on circumstantial evidence, "if I was shown all of the possibilies of beyond a reasonable doubt. I could." Thereafter, the prosecuting attorney questioned the venireperson concerning believing a police officer over a lay person, her employment and whether jury service would cast an undue burden on her. The defense did not question the venireperson about circumstantial evidence, or direct evidence for that matter. The prosecutor thereafter used a peremptory strike on the venireperson.

Although when the prosecutor voir dired the venireperson, because he then had appellant's written confession which had been ruled admissible evidence, his case was not entirely dependent upon circumstantial evidence, if at all. As things turned out, his case ultimately turned on circumstantial evidence. In fact, the trial judge instructed the jury on the law of circumstantial evidence.

Therefore, because appellant's written confession, which we attach to this opinion as "Appendix B",did not completely rule out an instruction by the trial judge on the law of circumstantial evidence, we hold that the prosecuting attorney exercised a peremptory on the venireperson rather than risk a hung jury.

The prosecuting attorney exercised a peremptory strike on the fourth black venireperson because, according to the prosecuting attorney who testified on this point, that person's reading and writing skills were poor. Since the case was complex and was expected to include detailed written jury instructions, the State evidently preferred to avoid literacy problems on the jury and used a peremptory strike on that person.

The fifth black venireperson gives us great concern because the testimony reflects that that person was peremptorily struck solely, by the testimony of the prosecuting attorney who testified on this point, because he had been an employee of the United States Postal Service for some thirteen years, and not "simply because he was black."

The record reflects that that venireperson expressed a certain difficulty understanding the law of causation in criminal cases, as well as the notions of "probability" and "continuing threat to society" concerning the punishment issues, which understanding we find was essential in order for the juror to decide whether appellant was guilty of capital murder and, if so, whether there was a probability that appellant would thereafter commit criminal acts of violence that would constitute a continuing threat to society. However, our reading of the entire jury selection process in this case discloses widespread disagreement and uncertainty among the venirepersons, as it does in nearly every capital murder case, regarding legal definitions and concepts, which are usually alien to most venirepersons. Not surprisingly, it is not uncommon for those venirepersons to appear inarticulate, confused, and tentative under these conditions. We find that this prospective black venireperson's answers to questions asked did not indicate an inability on his part, that was any greater or less than the unchallenged venirepersons, to understand the law or to apply it impartially. This venireperson also did not indicate a bias or prejudice against any phase of the law

pertinent to this case. Indeed, the State did not urge at the hearing any such basis upon which to doubt the venireperson's qualifications for jury service. As noted, the sole reason given why the venireperson was struck was that he was an employee of the United States Postal Service.

We have some difficulty understanding the relevancy of a venireperson's employment as a postman employed by the United States Government as far as his qualifications for jury service. Although the prosecuting attorney indicated that "I have not had very good luck with postal employees", she did not elaborate upon her evident bias against such employees. Perhaps, indeed, federal postal employees share a common view of the criminal justice system antithetical to the interests of law enforcement. But if so, we are not aware of it, nor has the State undertaken to enlighten us further on the subject.

Notwithstanding what we have stated, we find that the prosecuting attorney's reasons that she gave constitute a racially neutral explanation, and it is not the office of this Court to judge her credibility. Explicit in Batson, supra, is that a prosecuting attorney is free to exercise his peremptory strikes, provided that they are non-race related. "The challenge, after all, is still a peremptory one." See Belcuore, supra.

Therefore, we conclude, with respect to the five complained about black venirepersons, that a rational trier of fact might have failed to find, by a preponderance of the evidence, an intentional discrimination on the part of the prosecuting attorneys in this cause. By so holding, we remind trial judges who are confronted with the issue that in their capacities as factfinders the truth of a racially neutral explanation should be judged in part by its plausibility. A trial judge may not abdicate his responsibility to decide whether a peremptory challenge was racially motivated, nor may he leave such questions to an appellate resolution. He is the fact-finder in such matters, and must find the facts fairly and

judiciously, according to the burdens of proof prescribed by law.

We have carefully scrutinized the prosecuting attorneys' offered reasons why they used five of their peremptory strikes on the above five black venirepersons in light of the hearing that was conducted by the trial judge and find and conclude that the trial judge believed the race-neutral explanations given by them. Whether this Court would have made the same judgment as the trial judge did is unimportant, because her conclusion, given a subjective belief in the truth of the prosecuting attorneys' explanations, which is supported by sufficient evidence, comports with that of a rational trier of fact.

Appellant's first contention is overruled. Also see People v. Turner, 726 P.2d 102, (Calif. 1986); Branch v. State, ___S2d___ (Ala.Ct..Crim.App. 11/12/'86); Wallace v. State, ___S2d___ (Ala.Ct. Crim.App., No. 1 Div. 360, 3/10/'87); United States v. Woods, 812 F2d 1483 (4th Circ. 3/5/'87); State v. Butler, 731 S.W.2d 265 (Mo.St.Ap., W.Dist. 4/7/'87), State v. Jones, S. Carolina #22751, 7/30/'87. Also see footnote 2, ante.

Appellant next contends that his conviction should be reversed because "The trial court erred in overruling ...is motion to quash the indictment for the reason that it fails to set forth clearly and unequivocally the offense for which he was charged in plain and intelligible words insomuch that Appellant was precluded from knowing the exact nature of the offense for which he was charged." We disagree.

The indictment in this cause, in unnumbered count one, charged that appellant,"while in the course of committing and attempting to commit the Robbery of MARY D. BERRY, hereafter styled the Complainant, intentionally cause[d] the death of the Complainant by suffocating the Complainant by placing a cloth gag in her mouth", and, in unnumbered count two, charged that appellant, "while in the course of committing and attempting to commit the Kidnapping of MARY D. BERRY, hereafter styled the Complainant, intentionally cause[d] the death of the Complainant by suffocating the Complainant by placing a cloth gag in her mouth." Both counts were submitted to the jury. The jury's verdict simply reads: "WE, THE JURY, FIND THE DEFENDANT, PHILLIP DANIEL TOMPKINS, GUILTY OF CAPITAL MURDER." Sec. Art. 37.07, Sec. 1 (a), V.A.C.C.P.

We understand appellant's argument to be that the indictment was subject to his motion to quash because it failed to give him notice of the constituent elements of the offenses of robbery and kidnapping, attempted kidnapping, and attempted robbery, which were the underlying offenses alleged in this cause to elevate the offense of murder to capital murder. See V.T.C.A., Penal Code, Section 19.03. We find no authority supporting appellant's contention. The capital murder statute, Section 19.03, supra, does not require the pleader to define with particularity in the indictment the constitutent elements of the underlying felony offenses that were alleged in the indictment in this cause.

Just recently, in Landry v. State, 706 S.W.2d 105 (Tex.Cr.App. 1985), this Court rejected a like contention, simply stating the following: "[T]his Court has in the past upheld capital murder indictments identical to the instant indictment in the face of a motion to quash. See Hammett v. State, 578 S.W.2d 699 (Tex.Cr. App.1979), Burns v. State, 556 S.W.2d 270 (Tex.Cr.App.1977); Smith v. State, 540 S.W.2d 693 (Tex.Cr.App.1976 , and Demouchette v. State, [illegible]

proposition that it is unnecessary to allege the elements of the underlying felony in a capital murder indictment. . ." (107-108).

Hammett, supra, cited Smith, supra, Burns, supra, Gonzalez v. State, 517 S.W.2d 785 (Tex.Cr.App.1975), Watts v. State, 516 S.W.2d 414 (Tex.Cr.App.1974), and Livingston v. State, 542 S.W.2d 655 (Tex.Cr.App.1976), as its authority, all of which made a like conclusory holding. Smith, supra, merely held: "Appellant's contention [that the indictment was fatally defective because it failed to set out the elements of robbery where the charge was murder committed in the course of committing a robbery] was answered adversely to him in Jones v. State, 53 Tex.Cr.R. 131, 110 S.W. 741, and Oates v. State, 48 Tex.Cr.R. 131, 86 S.W. 769, which hold that an indictment need not allege the constituent elements of a felony which the defendant was committing or attempting to commit at the time of the homicide charged in the indictment.", i.e., an indictment charging one offense during the commission of another crime need not allege the elements of the latter offense. Also see Brasfield v. State, 600 S.W.2d 288 (Tex.Cr. App.1980); White v. State, 543 S.W.2d 104 (Tex.Cr.App.1976); Earl v. State, 514 S.W.2d 273 (Tex.Cr.App.1974). Appellant's contention is overruled.

In overruling appellant's contention, we are not unmindful of what this Court stated and held in King v. State, 594 S.W.2d 425 (Tex. Cr.App.1980). There, this Court held that a capital murder indictment

which did not allege who the victim of the underlying offense was, contrary to here, was subject to the defendant's motion to quash. This Court held: "It is clear that when criminal conduct, constituting an aggravated feature of an offense may be directed at a person other than the ultimate victim of the crime alleged, the specification of that person is a fact to which the accused is entitled should he request it by timely filed written motion to quash. (Citations omitted.)" (426) (Our emphasis.) In reaching this holding, this Court distinguished several of the above mentioned cases where relief had not been granted and pointed out that "the name of the person at whom the aggravating conduct is directed is not an essential element in such a context, but rather, a fact which is crucial to the accused's preparation of his defense to the main charge of capital murder," (426-427), i.e., when criminal conduct constituting an aggravating feature of an offense may be directed at a person other than the ultimate victim of the crime alleged, the specification of that person is a fact to which the accused is entitled should he request it by timely filed written motion to quash. The requirements of King, supra, were satisfied in this cause because the indictment here alleged that Berry was both the victim of the murder and the victim of the robbery and kidnapping. E.g., Pinkerton v. State, 660 S.W.2d 58, 63 (Tex.Cr.App.1983). Cf. Beck v. State, 682 S.W.2d 550 (Tex.Cr.App.1985).

We find and hold that the indictment in this cause did not fail to convey some requisite item of notice to appellant. Cf. Adams v. State, 707 S.W.2d 900 (Tex.Cr.App.1986), in which a majority of this Court expressly overruled this Court's decision of Jeffers v. State, 646 S.W.2d 185 (Tex.Cr.App.1983), which had expressly overruled Craven v. State, 613 S.W.2d 488 (Tex.Cr.App.1981). Also see Drumm v. State, 560 S.W.2d 944 (Tex.Cr.App.1977).

Appellant's contention that the trial judge should have sustained his motion to quash the indictment, for the reasons he gave, is overruled.

Appellant next asserts that his conviction should be reversed because "The trial court erred in permitting the prosecution to call during the guilt/innocence phase of trial the Appellant's wife as a witness for the State in the presence of the jury." As authority, appellant relies upon, inter alia, the provisions of Art. 38.11, V.A.C.C.P., the "husband-wife privilege" statute that prohibits either spouse, except in certain enumerated instances not applicable here, from testifying against the other spouse. For an up-to-date discussion of the privilege, which may no longer exist because of Rule 504, Tex.Rules of Crim. Evid., effective September 1, 1986, see Willard v. State, 719 S.W.2d 595 (Tex.Cr.App.1986). Because appellant's trial occurred prior to September 1, 1986, the provisions of Art. 38.11, supra, are applicable to this cause.

On the issue of whether or not a common law marriage existed, the trial judge in this cause first instructed the jury in the abstract on the elements of a common law marriage: "1. An agreement to become husband and wife; 2. Cohabitation pursuant to that agreement; and (3) A holding out of each other to the public as husband and wife pursuant to the agreement," and then instructed the jury that "if it [found] by a preponderance of the evidence that a common-law marriage exist[ed] between Phillip Daniel Tompkins [appellant] and Lisa Miles, then [it would] not consider the testimony of Lisa Miles for any purpose and [would] wholly disregard [her testimony]." The jury was not asked to make, nor did it make, a specific finding on the issue.

The record reflects that the trial judge conducted a hearing out of the jury's presence on the appellant's motion to prohibit Miles from testifying for the State and against him, after which she, the trial judge, overruled the motion and permitted Miles to testify for the State.

Although the record reflects that Miles was originally arrested with appellant for committing the capital murder of the deceased, the record does not reflect or indicate that she was ever formally charged with committing or participating in the commission of the murder of the deceased. The record does reflect that after she was arrested she was released, but does not reflect the circumstances that governed her release. We have yet to find in the record a request by appellant that the jury could find that Miles, either as a matter of fact or law, was an accomplice witness. However, our review of the record reflects that such a request would have been without merit.

The record of the hearing held outside the presence of the jury to determine whether Miles and appellant were common law husband and wife reflects the following: Miles testified that she had known appellant "Since about August or September of 1980", commenced living with him on December 1, 1980, and continued to live with him until they were both arrested in Austin on January 26, 1981. Miles testified that although she and appellant were not married "in the eyes of the law," because a ceremonial marriage had not yet been performed, she nevertheless considered herself then married to appellant. She further testified that she and appellant intended in the future to go through a ceremonial marriage. Miles admitted in her testimony that she never told anyone, including her mother, that she and appellant were married, because "the question never came up"; admitted that she never filed with any County Clerk a declaration of informal marriage, see Section 1.92, Family Code; and admitted that she never went "by the name of Lisa Tompkins." The testimony also established that when appellant and Miles decided to live together they rented an apartment together but signed their respective names to the apartment lease. There is also testimony that Miles had a young child; however, the record does not reflect any specifics regarding the child, such as who the natural father of the child might have been and what relationship, if any, Miles and that person might have had. The subject of Miles' prior marital history, if any, was not broached by the parties.

The issue before us is not whether there was sufficient evidence before the jury to warrant the trial judge submitting the issue, whether as a matter of fact there was a common law marriage between appellant and Miles, to the jury because, by her instruction to the jury, the trial judge found that there was sufficient evidence to raise the issue of a common law marriage and so instructed the jury for it to resolve. The issue that we must resolve is whether appellant established as a matter of law at the hearing held outside of the jury's presence that he and Miles were married common law. In Bodde v. State, 568 S.W.2d 344, 352 (Tex.Cr.App.1978), this Court pointed out the following: "Although the better view is that such issues should be decided by the trial judge. . . prior decisions of this Court dictate that this issue, when raised by the evidence, be submitted to the jury. . ." This Court has long held that it will closely scrutinize a claim of common law marriage, and requires that the agreement to become husband and wife should be established by a preponderance of the evidence showing that the agreement was to be specific on both sides. See Hightower v. State, 629 S.W.2d 920 (Tex.Cr.App.1981); Bodde v. State, supra; Chatman v. State, 513 S.W.2d 854 (Tex.Cr.App.1974); Welch v. State, 151 Tex.Cr.R. 356, 207 S.W.2d 627 (Tex.Cr.App.1948). In Welch, supra, this Court emphasized the following: "Marriage is more than a contract, it is a status in which stability and permanence are vital, and this is particularly true when dealing with common-law marriages."

The elements of a common law marriage, as the jury was instructed in this cause, are the following: (1) that the parties enter into an agreement, express or implied, to become husband and wife; (2) that they thereafter cohabit pursuant to that agreement; and (3) a holding-out of each other to the general public that they are husband and wife. However, in order to establish a common law marriage as a matter of law, it is not necessary to establish each element by direct proof, as each element may be established by circumstantial, as well as direct, evidence. Marriage, whether ceremonial or common-law, although the character of the evidence might be different, is proved as any other fact might be proved. See, for example, Claveria's Estate v. Claveria, 615 S.W.2d 164 (Tex.1981).

The provisions of Art. 38.11, supra, which prohibit husband or wife from testifying against each other, except in certain enumerated instances not applicable here, were not enacted to protect those persons "who are not legally married, nor parties who are unmarried, but who live together and recognize each other as husband and wife." Johnson v. State, 54 S.W.2d 140, 141 (Tex.Cr.App.1932). Merely living together with a person of the opposite sex and having intimate relations with that person do not establish, without more, the relationship of husband and wife. See Johnson v. State, supra, at 141. Whether a common law marriage has been established as a matter of law, as appellant asserts occurred here, must be decided on an ad hoc basis.

We reaffirm the rule of law that testimony of a witness that merely constitutes a conclusion that a common law marriage exists is not sufficient, standing alone, to establish a common law marriage. See, for example, Bush v. State, 261 S.W.2d 158, 160 (Tex.Cr.App. 1953).

It is undisputed in this cause that Miles and appellant lived together and cohabited for approximately two months. The fact that they might have intended to go through a ceremonial marriage at sometime in the future does not necessarily negate the inference that they believed that they were married common law. Bernandez Aguilar v. State, 715 S.W.2d 645, 648 (Tex.Cr.App.1986). We find that appellant has sustained his burden as to two of the above three elements that would establish a common law marriage. The question then becomes, did he establish the third element, a holding-out by himself and Miles to the general public that they were husband and wife? We answer this question in the negative. We find and hold that the undisputed evidence establishes at most only an illicit relationship between Miles and appellant.

Although our courts, including this one, have either expressly or implicitly held that an agreement to become husband and wife might occur in private, our research to date reveals that all courts have always required that before a common law marriage might be found to exist as a matter of law there must be evidence, inter alia, that the parties held themselves out to the general public as husband and wife. See Speer's Texas Family Law, Chapter 2 (1975 edition).

From the evidence that was adduced at the hearing that was held outside the presence of the jury, we find that at most all that appellant established was that he and Miles might have had "a secret common law marriage," which does not constitute in Texas a common law marriage. See Ex parte Threet, 333 S.W.2d 361 (Tex.1960). Except for a "Harris County Pretrial Services Agency" form that is in the record, which was completed after appellant was placed in the Harris County Jail, and which pertains to possible pretrial release on bail without surety, and which was not introduced or offered into evidence at the hearing held outside the jury's presence, there is not a scintilla of corroborative evidence that might reflect or indicate that Miles and appellant held themselves out to the general public as husband and wife. This form does not appear to have been completed by appellant, but appears to have been completed by a third person based upon information that appellant gave that person. It is undisputed that at all times Miles maintained her last name and never used appellant's last name. When Miles and appellant rented an apartment, she did not use appellant's last name. Miles herself testified that she never told anyone, including her mother, that she and appellant were married. Thus, there is absolutely no non-hearsay independent testimony or evidence that Miles and appellant ever held themselves out to the general public that they were husband and wife.

Appellant's contention that he established as a matter of law at the hearing conducted outside the jury's presence, or that he established during the jury's presence, that he and Miles were married common law is overruled.

Appellant next complains of the trial judge's refusal to instruct the jury on the lesser offenses of involuntary manslaughter and criminally negligent homicide at the guilt stage of the trial. After having carefully read the record, and the definitions of what constitutes criminally negligent homicide and involuntary manslaughter, we are unable to agree with appellant that the evidence adduced called for instructions on either of these lesser offenses.

In determining whether a defendant is entitled to a charge on a lesser included offense, this Court considers all the evidence presented. See, for example, Cordova v. State, 698 S.W.2d 107, 113 (Tex.Cr.App.1985). Also see Lugo v. State, 667 S.W.2d 144 (Tex.Cr. App.1984). If evidence from any source raises the issue of a lesser included offense an instruction on that offense must be included in the court's charge to the jury. See, for example, Bell v. State, 693 S.W.2d 434 (Tex.Cr.App.1985).

In determining whether a lesser included offense instruction must be given, a majority of this Court has long subscribed to a two-step analysis, which was first enunciated in the panel opinion of Royster v. State, 622 S.W.2d 442 (Tex.Cr.App.1981), and later adopted by a majority of the En Banc Court in Aguilar v. State, 682 S.W.2d 556 (Tex.Cr.App.1985). Also see Thomas v. State, 701 S.W.2d 653, 656 (Tex.Cr.App.1985). The two-step analysis requires first, that the lesser included offense is included within the proof necessary to establish the offense charged and, second, there must be some evidence in the record that if the defendant is guilty he is guilty only of the lesser offense. This "guilty only" rule of law has been interpreted by this Court to mean that if the evidence only raises the issue that the accused is guilty of the greater offense, or not guilty at all, an instruction on a lesser included offense need not be given. On the other hand, if the evidence raises the issue that, if guilty, the defendant is only guilty of the lesser offense, the instruction should be given.

The record reflects that appellant did not testify at the guilt stage of the trial, nor did he offer any evidence or testimony which might reasonably have raised the inference that if guilty, he was guilty only of criminally negligent homicide or involuntary manslaughter. The fact that the State, in proving the offense of capital murder, also proved the lesser offense of criminally negligent homicide or involuntary manslaughter does not, standing alone, entitle appellant to a charge on the lesser included offenses of criminally negligent homicide or involuntary manslaughter. See, for example, Cordova, supra.

The evidence reflects that appellant's twenty-four year old female victim, who was employed at Hermann Hospital in Houston as a pharmacist, left work at approximately 11:15 o'clock p.m. on Sunday, January 25, 1981. Approximately one hour later, her automobile was found abandoned, with its engine running, its lights on, and its doors closed, but not locked. Evidence was also presented from which one might infer that her wrong door caused her to stop her car and thereafter kidnapped or abducted her. The victim's gagged and bound body was found during the morning hours of January 27, 1981 tied to a tree, which was located near the residence of the person who ultimately discovered her body. The record reflects that this person first only saw an object that had a bedsheet draped over it, which later fell to the ground, thus later enabling this person to identify the object as the body of a human being, which later was identified as the deceased. The victim's hands were tied tightly behind her back and a piece of shirt was tied around her neck and connected to her hands. The victim's feet were tied together with a bed sheet and an electrical cord. The entire system of knots and materials was very tight and the body appeared to have been previously under a lot of tension. However, the evidence also reflects that there was enough slack that would have allowed some movement of the victim's knees and shoulders. There was also evidence that the tree the body was leaning against showed "scuff marks up and down", from which, with

the bruisesand abrasions found on the body, one might infer that the victim had attempted to escape. A gag of bed sheet material was, as was the victim's tongue, stuffed deep into the posterior pharynx, which is the rearmost portion of the mouth. There was also a gag wrapped tightly around the body's mouth. Dr. Joseph A. Jachimczyk, the world renowned Chief Medical Examiner for Harris County, performed an autopsy on the body of the deceased after which he concluded that the cause of death was suffocation due to gagging from the cloth gag found inside of the body's mouth. Jachimczyk also testified that if there was "no air coming in", it would take between 3 to 5 minutes after the gagging took place before Berry suffocated to death. Jachimczyk further testified that gagging is "as sure as sure a way" to cause someone's death, and that "if the degree of gagging is adequate, a person is just as dead from that as they are from a gunshot wound." The exact time of death could not be determined.

The evidence also established that between the time when Berry, the victim, disappeared until her body was found, appellant had used her bank teller card to obtain $1,000. There was also evidence that on the evening when Berry was last seen alive appellant was financially embarrassed, but soon thereafter appeared to have much money. There is no evidence in the record that might reflect or indicate that appellant had ever met or even seen his victim before the evening in question.

Although appellant gave a written confession to committing the crime, the trial judge, pursuant to appellant's motion to suppress, after first ruling that the confession was admissible evidence, later ruled that the confession could not be used against appellant. In his confession, appellant stated that he had tied and gagged his victim solely to keep her from escaping and seeking help while he went and used the victim's bank card to obtain money. The confession reflects that when appellant returned to where the victim had been gagged and tied to the tree he saw that she was then dead, thus causing him to panic and ultimately flee to Austin where he was arrested on January 28, 1981. 2/

2/ It appears that had appellant's written confession been admitted into [illegible]

Appellant contends that he was entitled to an instruction on the lesser offense of criminally negligent homicide because the evidence clearly supportsthe finding that he caused Berry's death negligently, rather than intentionally. Given the above, and the penal code definition of criminally negligent homicide, we disagree.

Criminallynegligent homicide may be a lesser included offense of involuntary manslaughter, which may be a lesser included offense of murder,which may be a lesser included offense of capital murder. See, for example,Lugo v. State, 667 S.W.2d 144, 147 (Tex.Cr.App.1984).

V.T.C.A., Penal Code, Section 6.03 (d), defines "Criminal Negligence" as follows: "A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." (Our emphasis.)

Recently, in Mendietta v. State, 706 S.W.2d 651, 653 (Tex.Cr.App. 1986), a majority of this Court ruled that "It is incumbent that the record contain evidence showing an unawareness of the risk before a charge on criminally negligent homicide is required."

We cannot conclude from the evidence that was presented that one might infer therefrom that when appellant gagged, tied his victim's hands tightly behind her back, tied a piece of shirt around her neck, which was connected to her hands, tied her feet together with a bed sheet and an electrical cord, with the entire system of knots and materials used to tie her to a tree tied very tight, that he was then unaware of the risk his conduct created. Just because it might be speculated that appellant did not intend the result, given the admissible evidence, such does not change his awareness or perception of the risk his conduct created. We find and hold that the issue of criminally negligent homicide was not raised by the evidence.

The trial court did not err in refusing to give the jury an instruction on that offense. Also see Still v. State, 709 S.W.2d 658 (Tex.Cr.App.1986); Thomas v. State, 699 S.W.2d 845 (Tex.Cr.App.1985); Hunter v. State, 647 S.W.2d 657 (Tex.Cr.App.1983); Lewis v. State, 529 S.W.2d 550 (Tex.Cr.App.1975).

Much of what we have stated above is also applicable to appellant's claim that the trial judge erred in not instructing the jury on the lesser offense of involuntary manslaughter.

One of the ways that the offense of involuntary manslaughter might be committed is if the defendant recklessly causes the death of another individual. See V.T.C.A., Penal Code, Section 19.05 (a) (1). The culpable mental state of recklessly is defined as follows in V.T.C.A., Penal Code, Section 6.03 (c): "A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's viewpoint." (Our emphasis.) As previously pointed out, appellant did not testify or offer any evidence that he caused his victim's death by a reckless act. Without evidence that appellant acted recklessly in causing the death of his victim we cannot state that the issue of involuntary manslaughter was raised by the evidence that was presented at the guilt stage of the trial. Cf. Lugo v. State, supra. Contrary to criminal negligence, which arises when a person ought to be aware of a substantial risk that the circumstances exist or the result will occur, involuntary manslaughter arises when a person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. We are unable to

infer from the evidence that was presented that the issue whether appellant ought to have been aware of a substantial risk when he gagged and bound his victim to a tree and that might have caused her death was raised. The evidence reflects appellant left enough slack that would have allowed some movement of his victim's knees and shoulders. Thus, this act itself reflects that he was not "reckless" as the term is defined. Also see Gordon v. State, 640 S.W.2d 743 (Tex. App. --4th 1982), no P.D.R.

Appellant also argues under his contention regarding his claim that the trial judge erred in not instructing the jury on the lesser offenses of criminally negligent homicide and involuntary manslaughter that the Supreme Court decision of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), also see Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed2d 844 (1973), mandates such instructions be given. We disagree. There, the Supreme Court held that where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction of the alleged offense, thus requiring that the jury be given the option of convicting the defendant of some lesser included offense. Although we do not disagree with what the Supreme court stated in the above cases, we find that Beck, supra, is factually distinguishable from the instant case. In Beck, supra, the defendant testified at trial and denied that he killed his victim or intended his victim's death, whereas here appellant did not testify or present any evidence from any source that he possessed only the intent to either rob or kidnap Berry. E.g. Santana v. State, 714 S.W.2d 1, 9 (Tex. Cr. App. 1986).

Appellant's contentions that the trial judge erred in refusing to instruct the jury on the lesser offenses of criminally negligent homicide and involuntary manslaughter are overruled.

Appellant next contends that "The trial court erred in overruling his objection to the prosecution having placed on the stand and eliciting testimony from [Jean Matthews, a Virginia] penal psychologist, who had consulted with Appellant in 1979 [,when he was incarcerated in the Virginia penitentiary,] for the reason that neither Appellant nor his counsel were notified in advance that the psychologist's testimony would encompass the Appellant's future dangerousness."

To fully understand and appreciate appellant's complaint, which at first blush appears frivolous, but which we find is not, we believe that it is necessary to give a little background information on appellant that pertained to when he was incarcerated, that relates to other than Matthews' testimony.

The record reflects that at the punishment stage of the trial the State established that in 1977 appellant was received by the Virginia Department of Corrections, Commonwealth of Virginia, after he had been convicted in a trial court of Virginia for committing the offenses of "Statutory Burglary" and "Grand Larceny." Evidence was also presented that when appellant was incarcerated in the penitentiary he became a "straw boss", who was an inmate given orders by employed personnel to keep other inmates in line and to relay to them what the employed personnel desired to be done or accomplished on behalf of the penal institution. Appellant was a "straw boss" for Herbert E. Norman, who was then Assistant Director of Recreation and a crew foreperson for the Department of Corrections. Appellant had the job of "straw boss" for approximately two years, which encompassed most of the time he was incarcerated in the Virginia penitentiary. Norman testified that the reason that appellant was given the job of "straw boss" was because "nobody gave Mr. Tompkins a hassle. He had a way to handle himself pretty good and he had a way with himself, and he could get across what I had to get across." Appellant also assisted Norman in refereeing football and softball games that occurred between inmates. There was testimony that appellant, like many other inmates, would occasionally get into fights with other inmates.

The record also reflects that appellant was released from the penitentiary on February 28, 1980, when he was placed on parole. He remained on parole until July 9, 1980, when the parole officer's file on him was closed because he was "an absconder." A warrant for his arrest issued, however. The warrant was executed in our capital city, Austin, the day of appellant's arrest in this cause. See ante.

The record also reflects that while incarcerated in the Virginia penitentiary, appellant came into contact with Jean Matthews, a Ph.D. who was a "clinical-correctional psychologist" and head of the Psychology Services at Saint Brides Correctional Center in Chesapeake, Virginia. Although Matthews' credentials qualified her as an expert in her field of psychology, there is no testimony or evidence in the record that she has ever been licensed or certified by the Commonwealth of Virginia or any other State of the Union as a "clinical-correctional psychologist". The record, however, reflects that the parties treated her as though she was an expert in her field of endeavor.

The record reflects that appellant, while incarcerated and on his own volition, went to Matthews where he requested that she give him "specific kinds of help" that related to his inability to sleep and eat, and his problems with depression. Matthews saw appellant approximately a total of eight times, but never administered any clincial tests nor did she prescribe any medication for him. This occurred between July, 1979 and December, 1979. Matthews also had occasion to observe appellant when he was outside of her office in the prison yard, and once observed him fighting with another inmate, in which fight she stated that appellant "shattered" the other inmate's jaw. Matthews testified that from her interview sessions with appellant she concluded that "[h]e was frequently depressed"; "he has a wide range of characteristics from being a very nice, a very congenial person to being placating, manipulative, and from time to time, threatening and violent. He had a hard time controlling his

temper. . . [T]he intensity [of emotion] with Phil is very great. . . but the intensity of emotion that he felt was out of proportion to the actual problem. . . He has this wide range of behavior as crying and maybe being very happy or very joyous or very sad or very angry, and he didn't seem to be able to control which of those things came out in any given situation." From her interviews with appellant, Matthews concluded that appellant did not want to be and could not be rehabilitated, "[u]nless he were given some intensive psychotheraphy and he desired to have that kind of change. It would take quite a bit of doing." Although Matthews further testified that appellant's propensity to commit future acts of violence was "unpredictable", she also testified that in her opinion there was a probability that appellant would continue to commit criminal acts of violence that would constitute a threat to society. Matthews admitted in her testimony that another psychologist might "draw different conclusions and opinions [of appellant]" than she did.

Appellant's sole objection at trial to Matthews' testimony was the following: "We have objections to any questions or answers in regard to the relationship between [Matthews] the psychologist and the inmate [appellant]." It is highly questionable whether the claimed error is properly before us for review. Nevertheless, given the fact that appellant has been assessed the death penalty, we will assume that his contention is properly before us for review.

Appellant argues that "the introduction of the prison psychologist from her communications with Appellant during his compelled incarceration period while in a Vriginia Correctional institution in 1979 was and remains privileged under Article 5561h, Vernon's Ann. (Texas) Civil Statutes and therefore was not available to the State for any purpose. (Citations omitted.)" Appellant also argues that such testimony was admitted in violation of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 369 (1981). At no time, however did appellant expressly invoke in the trial court the provisions of the above statute, and, although appellant brought out during his voir dire examination of Matthews the fact that Matthews did not give him the Miranda

warnings when she interviewed him, see Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), at no time did appellant complain, either expressly or implicitly, that Matthews' testimony was obtained in violation of the holding in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), which was decided on May 18, 1981, almost four months to the day after appellant committed the offense at bar and before he was tried in this cause.

In Smith, supra, the Supreme Court held that a psychiatrist's testimony on future dangerousness, which had been obtained pursuant to a court-ordered psychiatric examination only to determine the accused's competency to stand trial, was inadmissible evidence because it violated the accused's Fifth Amendment privilege against compelled self-incrimination and also violated the defendant's Sixth Amendment right to counsel because court appointed defense counsel was not notified in advance that the pyschiatric examination would encompass the issue of future dangerousness.

We have diligently searched the record of this cause for an objection by appellant to Matthew's testimony on the basis of Smith, supra, error, but have yet to find such an objection, and appellant does not point to any place in the record where he objected in the trial court on this basis. In Granviel v. State, 723 S.W.2d 141 (Tex.Cr.App.1986), this Court held that a failure to object on the basis of Smith, supra, error, where the accused's trial occurs after Smith, supra, had been rendered, waived any Smith, supra, error, which we find occurred here. Furthermore, given the facts upon which appellant relies on appeal to raise Smith, supra, error, and the facts that are in Smith, supra, we find appellant's reliance on Smith, supra, sorely misplaced. The record clearly reflects that Matthews' interviews with appellant were only done at appellant's insistence, and not at the command of Matthews or any other state official. Matthews' did not "compel [appellant] to speak [with her] where he would not otherwise [have done] so freely." Granviel, supra. Lastly,

when Matthews spoke with appellant she was not ordered by any court to speak with him.

Appellant's complaint, as it relates to Smith, supra, error, is overruled.

We will next determine whether appellant was entitled to invoke and have applied to this cause the provisions of Art. 5561h, V.A.C.S., as that statute was worded when appellant's trial occurred. This statute became effective August 29, 1979; was amended effective September 1, 1983, but repealed effective September 1, 1983, by order of the Supreme Court of Texas, "insofar as it relates to civil actions." Appellant's trial occurred in 1981. Insofar as it might relate to criminal prosecutions, the statute has been replaced by Rule 509, Tex.Rules of Crim.Evid., effective September 1, 1986. For prior discussion of Art. 5561h, supra, see Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105 (Tex.1985); Ex parte Abell, 613 S.W.2d 255 (Tex.1981); Wimberly Resorts Property, Inc. vs. Pfeuffer, 691 S.W.2d 27 (Tex.App.-Austin 1985); Beflin v..State, 640 S.W.2d 58 (Tex.App.-Austin 1982), P.D.R. refused; Gaynier v. Johnson, 673 S.W.2d 899 (Tex.App.-Dallas1984); Wade v. Abdnor, 635 S.W.2d 937 (Tex.App.-Dallas 1982); Tumlinson v. State, 663 S.W.2d 539 (Tex.App.-Dallas 1983), P.D.R. refused. Also see Art. 4495, V.A.C.S., and the discussion pertaining thereto that is found in this Court's decision of Blunt v. State, 724 S.W.2d 79 (1987).

We find that the State, in its response to appellant's contention, correctly argues that appellant cannot rely upon the provisions of Art. 5561h, supra, for several reasons: (1) Matthews was not shown to be authorized to practice medicine either in Virginia or Texas, or in any other State of the Union for that matter, and (2) there is no evidence that Matthews was licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional condition or disorder. We also find that appellant did not testify or offer any testimony or evidence that when Matthews interviewed him he reasonably believed that she was authorized to practice medicine in Virginia or reasonably believed she was licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional condition or disorder. Therefore, we find and hold that appellant has failed to satisfy one very important condition precedent in his claim that Matthews was prohibited from testifying because of the above statute, namely, Matthews was shown to come within the provisions of the statute.

Our disposition of appellant's contention does not stop here however, because, given the fact that the situs of the interviews between appellant and Matthews occurred in Virginia, we must determine whether, under conflicts of law, Matthews would have been prohibited from testifying in a Virginia criminal prosecution about her conversations with appellant, and the conclusions she drew therefrom. Although the evidence did not establish that Matthews was either a licensed or certified "clinical-correctional" psychologist in Virginia, because the parties treated her as having been licensed or certified by the State of Virginia, we will assume for argument purposes that she was licensed or certified by that State. Under Ex parte Mason, 656 S.W.2d 470 (Tex.Cr.App.1983), if this Court may ascertain with reasonable certainty what the law of another state might be, it is proper for this Court on its own to seek out that law. Our travels have led us to the Legislative Reference Library of this State where we found The Code of Virginia.

The Code, see § 8.01-400.2. Civil Remedies and Procedure, which governs communications between counselors, social workers, pyschologists and patients, is worded similarly to Art. 5561h, supra, except that it is restricted to civil actions. The Virginia Supreme Court held in Gibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975), that in Virginia there exists no physician-patient privilege in a criminal prosecution. See Virginia Code provision § 8.01-399, supra, which governs the physician-patient privilege in that state. We find that such holding would also govern the psychologist-patient relationship. Thus, under the doctrine of conflicts of law, Virginia law is of no assistance to appellant in his claim that the trial court erred in permitting Matthews to testify at the punishment stage of his trial. Also see 12 Tex.Jur.3rd Edition, "Conflict of Laws"; Leflar, American Conflicts of Law (1968 edition), Section 123; 56 Columbia Law Review (1956); Weinstein, "Recognition in the United States of the Privileges of Another Jurisdiction," at 543

Appellant's contention that the trial court erred in permitting Matthews to testify at the punishment stage of his trial is overruled.

Appellant next claims that he is entitled to a new trial because the trial court over objection erred in permitting the State's witnesses George Drummond and Charles William Murphy to testify against him as reputation witnesses at the punishment stage of the trial. We disagree.

We first observe that Art. 37.071, V.A.C.C.P., provides, inter alia, that in a capital murder sentencing proceeding "evidence may be presented as to any matter that the [trial] court deems relevant to sentence." This Court has held that a defendant's reputation for having a particular character trait may be admissible evidence at the sentencing stage of a capital murder case. See, for example, Nethery v. State, 692 S.W.2d 686, 707 (Tex.Cr.App.1985).

The record reflects that the State called Drummond to testify at the punishment stage of the trial and he testified that he had formerly been appellant's parole officer in Virginia after appellant was released from the Virginia pentitentiary in 1980. See ante. Drummond also testified that in his opinion appellant's reputation "in the community in which he lives for being a peaceful and law-abiding citizen" was bad. Drummond formed his opinion after having spoken with appellant's neighbors, his friends, and members of his family that he, appellant, had when he lived in Virginia.

Murphy testified that he was a Virginia Trooper and that in his opinion appellant's reputation "for being a peaceful and law-abiding citizen" was bad. Murphy formed his opinion after he had conversations with "The sheriff down in King and Queen County, Virginia and several other troopers. . ., talking with citizens in King and Queen County in the Cothorville area where Mr. Tompkins resided when he was in Virginia."

Appellant relies upon Wright v. State, 609 S.W.2d 801 (Tex.Cr. App.1980), as authority for his contention that neither Drummond nor Murphy were qualified to testify to his reputation for being a peaceful and law-abiding citizen when he lived in Virginia. We strongly disagree with appellant.

We first find that appellant's reliance upon Wright, supra, is sorely misplaced. The facts in Wright, supra, show that the defendant in that cause grew up in Dallas and the "bad" reputation witness who testified against him was a highway patrolman who lived in San Antonio and worked exclusively in Bexar County. It appears that the patrolman came into contact with appellant when he stopped appellant for violating some traffic law while in Bexar County. It also appears from the opinion that the sole basis for the reputation witness's testimony, that the defendant's reputation was bad, was a conversation that he had had with the prosecuting attorneys in that cause prior to the trial of the case. The defendant was tried in Dallas County. This Court held that the highway patrolman was not qualified to testify as a reputation witness against the defendant. In the concurring opinion that Judge Roberts filed in that cause, he correctly emphasized that a reputation witness's knowledge of another person's reputation for having a particular character trait or traits is gained by the members of the community in which the person lives or lived: "This appellant's community was in Dallas; he lived there and had been reared there. Yet the prosecuting attorneys called a reputation witness who never had worked in Dallas and who never had talked about the appellant to anyone other than themselves."

Here, however, both Drummond and Murphy's knowledge of appellant having a bad reputation for being a peaceful and law-abiding citizen was not limited as it was in Wright, supra, but instead rested on knowledge that they obtained from other persons in communities in Virginia where appellant had previously resided. Also see Wagner v. State, 687 S.W.2d 313 (Tex.Cr.App.1984) (On appellant's motion for rehearing); and Jackson v. State, 628 S.W.2d 446, 450, fn. 2 (Tex.Cr.App.1982).

We point out that appellant did not complain in the trial court, nor does he complain on appeal, that Drummond and Murphy were not qualified because the persons that they had had conversations with never specifically told them that appellant's general reputation for being a peaceable and law-abiding person was bad. See Jackson, supra. Notwithstanding this specific omission in the record, we nevertheless find and hold that given the fair import of the

witnesses' testimony, such indicates that the persons with whom they had discussed appellant's reputation for not being a peaceful and law-abiding person told them that appellant's reputation for such traits was bad. Therefore, we hold that both Drummond and Murphy were qualified to express an opinion as to appellant's reputation for not being a peaceable and law-abiding person in the communities where they knew him and where he once resided. Cf. Arocha v. State, 495 S.W.2d 957 (Tex.Cr.App.1973); Stephens v. State, 522 S.W.2d 924, 927 (Tex.Cr. App.1975); Ables v. State, 519 S.W.2d 464, 466 (Tex.Cr. App.1975).

Appellant's contention that Drummond and Murphy were not qualified "bad" reputation witnesses is overruled.

Appellant next contends that he should be granted a new trial because "final arguments of the State during the sentencing phase of trial was so clearly calculated as to inflame the minds of the jurors being of such character as to suggest the impossibility of withdrawing the impression produced on the jurors' minds."

Appellant also complains of another jury argument in the same point of error, that the same prosecuting attorney made at the punishment stage of the trial when she referred to a psychologist who testified for appellant as having "prostituted" himself when he testified on behalf of appellant. Appellant's objection to this argument was overruled by the trial judge.

We agree with appellant that neither argument was called for under this record, and both were clearly improper.

We find that appellant's first complaint goes to the fact that the prosecuting attorney referred to him in her jury argument "as an animal", to which comment trial counsel objected, the trial judge sustained the objection, instructed the jury to disregard, but overruled his motion for mistrial.

Although there appear to be decisions by this Court approving referring to the defendant as "an animal", we also find that there are many decisions of this Court which have reversed convictions because of such remarks as were made here. See the cases collated in Texas Manual of Reversible Errors in Texas Criminal Cases (1956 edition), § 529. Whether such an argument will constitute reversible error, however, must be decided on an ad hoc basis.

Many years ago, in Swilley v. State, 25 S.W.2d 1098 (Tex.Cr.

App.1979) "On original submission, Judge Lattimore of this Court pointedly remarked that "there is abundant room for legitimate discussion of the testimony and the law applicable, without indulging in personal abuse of the man who is at the bar of justice." (1099). Such an argument as was made here served no legitimate purpose except to jeopardize the State's cost on appeal. In Grant v. State, 472 S.W.2d 531, 534 (Tex.Cr.Cr.App.1971), Presiding Judge Onion was quick to point out for the Court that it is often difficult for members of this Court to understand why a prosecuting attorney would engage in argument that is similar, but not as aggravated, as occurred in this cause. Judge Onion correctly pointed out that "Abuse is not argument, and vituperation is not logic. . . It takes far less talent to indulge in abuse than in making an intellicent assessment of the facts and the law to aid the jurors in their task."

This Court should not have to point out that comments by the attorneys should always be confined to the record and the legitimate deductions from the testimony of the witnesses. Notwithstanding that we do not approve the above argument that referred to appellant as "an animal", it is axiomatic that it is not every improper

argument made by a prosecuting attorney to the jury that requires reversal. Before reversal may occur, because of improper prosecutorial jury argument, the argument must be examined in light of the entire record and must be extreme or manifestly improper, violative of a mandatory statute, or inject new facts into the case that are harmful to the defendant. Generally, an instruction by the trial judge to the jury to disregard the argument will be sufficient to cure any error. In this instance, the trial judge instructed the jury to disregard the argument. Given the facts of the case and the trial judge's prompt instruction to the jury to disregard, we are unable to say that such argument by the prosecuting attorney might have had any effect at all on the jury's decision to answer the two special issues in the affirmative. "This Court has held that language [by a prosecuting attorney], which may be objectionable, may also be so illogical, fanciful or extravagant as to require the conclusion that it could not have influenced the jury in arriving at their verdict." Brown v. State, 353 S.W.2d 425, 430 (Tex.Cr.App.1962). We find such statement applicable here

Appellant's second complaint gives us more concern. There is absolutely nothing in this record that might have justified the prosecuting attorney stating that the appellant's psychologist "prostituted himself on the witness stand." We find that when a prosecutor or a defense attorney uses the opprobrious term "prostitute" against a witness in his jury argument , when such is not supported by the evidence, the term might mean to many jurors what Judge Henderson of this Court expressed almost 100 years ago in Mc Cray v. State, 38 Tex.Cr.R. 609, 44 S.W. 170 (Tex.Cr.App.1898): "In common experience, it is known that persons who are so morally degraded as to ply their vocation as common prostitutes are not on a plane with the mass of people who follow legitimate and honorable vocations, in the matter of integrity. As a general rule, they are no more capable of telling the truth than one who has been convicted of a felony, or of some misdemeanor involving moral turpitude, and they are not more worthy of belief than such a one." Also see Cravens v. State, 687 S.W.2d 748 (Tex.Cr.App.1985). The trial judge clearly erred in not sustaining appellant's objection, albeit it was a general one. Also see and compare Gomez v. State, 704 S.W.2d 770 (Tex.Cr.App.1985).

Notwithstanding our strong disapproval of the prosecuting attorney's argument, referring to the defense witness as "a prostitute", we find that appellant did not properly and timely perfect the error. First, he has not set forth his contentions in separate points of error. See, for example, Kendrick v. State, 481 S.W.2d 877 (Tex.Cr.App.1972). Second, his general objection, "objection", amounts to no objection. Thus, appellant has waived his complaint. Cf. Fillender v. State, 557 S.W.2d 515 (Tex.Cr.App.1977). Notwithstanding our holding, we trust that such argument, unless the record makes it absolutely clear that such is called for, will not again in a court of law of this State be uttered by either an attorney for the State or an attorney for a defendant.

Appellant's contentions are overruled.

Appellant complains in his last point of error of action by this Court, "The Court of Criminal Appeals erred in overruling Appellant's motion to exceed the statutory limits of Rule 202 of the Rules of Appellate Procedure in that the denial of same and the rejection of the Appellant's original brief on appeal deprives this Appellant of his right to an effective appeal process from a judgment of conviction where the sentence imposed is death by lethal injection."

Under Rule 202 of the Appellate Rules, as it existed when appellant attempted to file his first brief, which was 144 pages in length, this brief clearly exceeded the then 50 page rule limitation, and this Court properly denied him permission to file that brief. Thereafter, appellant timely filed a well written brief that numbered only 47 pages. We have carefully compared the two briefs and find that, other than the original brief being more detailed, substantively, they are the same.

In considering all of appellant's points of error, we have carefully considered his contentions as set out in his original brief as well as the brief that was timely and properly filed, which we find is all that appellant is asking us to do in his last point of error.

Therefore, appellant's last contention is overruled.

Having carefully reviewed all of appellant's contentions, and finding that none merit this Court reversing appellant's conviction or sentence of death, the trial court's judgment of conviction and sentence of death are affirmed.

TEAGUE, Judge

EN BANC

DELIVERED: October 7, 1987

PUBLISH

Onion, P.J., and McCormick and Duncan, J.J., concur in the result.

PHILLIP DANIEL TOMPKINS, Appellant

NO. 68,870 v. - - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

This cause presents once again the conundrum of two lesser "culpable mental states:" recklessness and criminal negligence. Slip Opinion, at 20-25. The majority ultimately finds no evidence raising either. However, there are problems in its determinations of law germane to making those findings.[1/]

This cause provides an opportunity to consider that interpretations and applications of §6.03(c) and (d), in opinions primarily by Judge Odom, were accepted by the Court for

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1/ At the outset, in the course of discussing entitlement to a charge on a lesser included offense, on one page the opinion iterates usual rules about considering "all the evidence presented," and if evidence "from any source raises the issue" an appropriate charge must be given," citing correct authorities for those propositions. Id., at 20. (All emphasis is mine throughout unless otherwise noted.) On the next page, however, the opinion says the fact that the State's proof of the greater offense "also proved the lesser offense . . . does not, standing alone, entitle appellant to a charge of the lesser included offense," citing Cordova v. State, 698 S.W.2d 107 (Tex.CR.App. 1985) -- which was earlier cited to support the first rule! Both cannot be right, and from our cases the second is wrong.

The only authority for the second is "See Aguilar [v. State, 682 S.W.2d 556 (Tex.Cr.App. 1985)], and seeing it makes abundantly clear that Aguilar holds no such thing. Compare Aguilar, at 558: "Merely because a lesser offense is included within the proof of a greater offense, however, does not always warrant a jury charge on the lesser offense." But that it is so included may warrant the charge. Bell v. State, 693 S.W.2d 434, at 442 (Tex.Cr.App. 1985). Thus we may look to the proof adduced by the State, just as the majority does here. See Campbell v. State, 571 S.W.2d 161, 162 (Tex.Cr.App. 1978).

First the majority says appellant's conduct precludes an inference "that he was then unaware of the risk his conduct created," and speculation that he did not intend the result "does not change his awareness or perception of the risk his conduct created." Slip opinion, at 23. So much for criminally negligent homicide. Next it says, "Without evidence that appellant acted recklessly in causing the death of his victim [involuntary manslaughter was not raised]." Id., at 24. But the majority had just found appellant was aware of the risk.

several years, only to be suddenly rejected in a recent opinion crafted by Judge W.C. Davis, and to determine which view is correct.[2/] Remember, strictures placed on rights of an accused in one case will also have an impact on the State in satisfying its burden of proof in another. See note 7, post.

Under §6.03(c) and (d), "risk" is an essential condition; it is created by acts of accused, here with respect to result of his conduct. It must be both "substantial" and "unjustifiable." Once he has created that kind of risk an actor is either aware of it or ought to be aware of it. The Court has characterized the former as "conscious risk creation," the latter as "inattentive risk creation." Lewis v. State, 529 S.W.2d 550, 553 (Tex. Cr.App. 1975). Practice Commentary to §6.03.[3/]

An awareness may be inferred from the facts, but that one ought to be aware is a judgmental factor, along with others, at

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2/ The Odom view takes an analytical approach to the facts of the matter and a weighing of judgmental factors by a factfinder, rather than looking for evidence that directly and nicely fits either socalled "mental state." In these two instances more than many others, the several judgment calls must be left to factfinders. See Giles v. State, 617 S.W.2d 690, 691 (Tex.Cr.App. 1981); Dillon v. State, 574 S.W.2d 92, 94 (Tex.Cr.App. 1978) -- both written by Judge Odom. See also Lopez v. State, 630 S.W.2d 936 (Tex.Cr.App. 1982), by Judge McCormick, following Giles and Dillon. Compare post the Davis evidentiary view in, e.g., Simpkins v. State, 590 S.W.2d 129, 134 (Tex.Cr.App 1979), and Thomas v. State, 699 S.W.2d 845 (Tex.Cr.App. 1985); see my dissenting opinion in the latter.

3/ "Criminal negligence . . . does not require consciousness of risk. Rather the definition of criminal negligence in Subsection (d) inquires of the factfinder whether the actor ought to have been aware of the risk. As in recklessness, the risk must be substantial and the failure to perceive it an unjustifiable and gross deviation from the ordinary standard of care; however, the actor's conduct is weighed against an objective standard, that of the ordinary prudent man." (Emphasis in original).

work here.[4/] A failure to comprehend that concept is, in my view, revealed in two sentences written by Judge Davis in his panel opinion in Simpkins v. State, 590 S.W.2d 129 (Tex.Cr.App. 1979), viz:

> "However, the evidence in this case did not raise the issue of [negligent homicide]. No evidence indicates that the appellant possessed the requisite culpable mental state for negligent homicide, i.e., that he ought to have been aware of a substantial and unjustifiable risk."

Id., at 134. (Second emphasis is by the Court.) That notion lay dormant for a while, only to be revitalized by Judge Davis in Thomas v. State, 699 S.W.2d 845 (Tex.Cr.App. 1985).

Following behind Thomas, Mindieta v. State, 706 S.W.2d 653 (Tex.Cr.App. 1986), changed the formulation somewhat: "It is encumbent [sic] that the record contain evidence showing an unawareness of the risk before a charge on criminal negligent homicide is required. Thomas v. State, supra."[5/]

4/ "The adjectives 'substantial,' 'unjustifiable,' and 'gross' in the definitions . . . are admittedly vague and intended to only to focus on the judgmental factors the fact finder must weigh . . . . As forthrightly stated by the Model Penal Code reporter:

> 'Some principle must be articulated, however, to indicate what final judgment is demanded after everything is weighed. There is no way to state this value-judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the conduct and determine whether it should be condemned. * * * * The jury must find fault and find it was substantial. . . '"

Practice Commentary following §6.03.

5/ In Thomas, disdaining stare decisis, a majority did indeed criticise several prior opinions of the Court, viz:

> "The attendant circumstances from which the defendant's mental state can be inferred must be collectively examined in light of the definition of criminally

Footnote 5 continued -

That a person "ought to be aware" is not a matter of fact, readily susceptible to direct testimonial proof.[6] Whether under given facts and circumstances one "ought to be aware" of risk is a value judgment -- a matter of ordinary care, caution and prudence. Illustrative is Dockery v. State, 542 S.W.2d 644 (Tex.Cr.App. 1976) (Opinion on Rehearing), viz:

> "We conclude that the actions of appellant were sufficient to indicate that he ought to have been aware of the substantial and unjustifiable risk that his conduct might injure and kill the deceased, at whom the pistol was quite obviously pointed at the time it was fired. Clearly, the risk was of such a nature and degree that it constituted a gross deviation from the standard of care prescribed by Sec. 6.03(d)."

Footnote 5 continued -

> negligent conduct. See V.T.C.A. Penal Code, Sec. 6.03(d). In this respect [two prior opinions] are overbroad because they rely only on the pointing of a loaded weapon as being sufficient to raise criminally negligent homicide. Other evidence raising the issue of whether or not a defendant was aware of the risk must be presented before such charge is required.

Thomas, supra, at 850; in note 2, one of the two, Giles v. State, 617 S.W.2d 691 (Tex.Cr.App. 1981), is faulted for not providing "enough information from which to determine whether the defendant ought to have but did not perceive a substantial and unjustifiable risk in pointing a gun he knew was loaded at another." That criticism demonstrates the author of Thomas did not understand the issue in Giles refusal to charge on "reckless" involuntary manslaughter, not criminally negligent homicide; full facts of the incident as claimed by accused are excerpted from his confession and reproduced in the opinion. See Giles, at 691. In context the issue is, after all, defensive in nature and the question is whether some evidence raised it, not general evidentiary sufficiency. Moore v. State, 574 S.W.2d 122, 124 (Tex.Cr.App. 1978).

6/ Are witnesses to be permitted to say that accused was or was not obliged to be aware of a substantial and unjustifiable risk? Neither is a statement of fact; each is nothing but an expression of pure opinion. The factual evidence before the factfinder remains the same, and the "ought" requirement is for the factfinder to impose. See ante, n. 3.

Id., at 648.[7]

In Hunter v. State, 647 S.W.2d 657 (Tex.Cr.App. 1983), implicitly the Court went through a similar exercise. After reciting the facts and stating general propositions of law regarding charging of lesser offenses, the Court sets out verbatim §6.03(d), underscoring the "ought to be aware" et cetera clause. Reprising salient testimony of appellant, the Court concluded, "This testimony raised an issue as to whether appellant was negligent in not perceiving the risk which his conduct created." Hunter, supra, at 659. Obviously, from its treatment of the issue the Court had first concluded a jury could reasonably hold that accused ought to have been aware of the risk and he failed to perceive it.[8]

Unlike all homicide cases discussed ante, where death resulted from use of a deadly weapon, here the cause of death is suffocation caused by a gag inside and in the back of mouth of

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7/ Thomas speciously says, "The value of Dockery is limited because the rationale is not entirely clear as it focused on the distinction between voluntary action and intentional and unintentional acts." Id., at 850. Clarity, like Beauty, is in the eye of the beholder. Accused was convicted of negligent homicide in the first degree under our former penal code; after setting out allegations and essential proof, the Court stated, "The issue then is whether the conduct alleged and proved is an offense under the new Code." Dockery, at 647-648. The Court concluded it was, namely, criminally negligent homicide denounced by V.T.C.A. Penal Code, §19.07(a). Id., at 650.

8/ In Mendieta v. State, 706 S.W.2d 651 (Tex.Cr.App. 1986), quoted and followed by Judge Teague, the Court distinguished Hunter, saying certain testimony "showed that Harris [sic] was unaware of the risk his conduct was creating." 706 S.W.2d at 653. That analysis of Hunter is too simplistic, however. The point is that the Court determined it was for the judgment of the jury whether he ought to have been aware of the risk and, if so, was negligent in failing to perceive it.

deceased. Appellant did not testify, and content of his written confession was not before the jury; he did not affirmatively present witnesses on his behalf. So basically the facts are appellant abducted deceased, gagged and tied her up and to a tree.

Following the Davis view, the plurality would have the Court find appellant was not entitled to instructions on criminally negligent homicide and "reckless" involuntary manslaughter. What of the Odom view?

That a risk was thus created cannot be disputed. "If it is not a risk of which one ought to be aware, then neither criminally negligent homicide nor involuntary manslaughter would [be] shown." The risk created by appellant was death of his victim. "Upon consideration of recklessness versus criminal negligence, whether one is aware of a requisite risk or simply should be aware of it, is a conclusion to be drawn through inferences from all the circumstances by a trier of fact." The jury was not given an opportunity to make any such conclusion. "Whether one 'ought to be aware' of the risk is a matter of the character of risk involved." Under the circumstances a jury could have regarded a risk of death to be "substantial" and surely "unjustifiable." "The issue [in involuntary manslaughter] is . . . whether, given all the circumstances, it is reasonable to infer that the particular individual on trial was in fact aware of the risk." The jury could just as well have made that inference. Nash v. State, v. State, 664 S.W.2d 343, 344 (Tex.Cr.App. 1984); Lopez v. State, 630 S.W.2d 936, 941-942 (Tex.Cr.App. 1982), quoting approvingly from Dillon v. State, 574 S.W.2d 92, at 94 (Tex. Cr.App. 1978), and "seeing also"

that his failure to perceive that risk was a gross deviation from the proper standard of care.

When it appears an accused ought to be aware of a requisite risk, then also raised is the issue of whether he was in fact aware of the risk and consciously disregarded it. "Which of the two inferences regarding the accused's awareness of the risk is correct is a matter to be drawn from the circumstances by the jury. Dillon v. State, [supra]." Giles, supra, at 691.[10/]

In the Odom view it was therefore error to refuse to charge the jury on the lesser included offenses of involuntary manslaughter and negligent homicide so that the jury could decide whether to infer recklessness or negligence or intent to kill. Instead, the jury was permitted only to convict of capital murder or to acquit. See Giles, at 691. In the Davis view it was not error.

Because the plurality opinion is internally contradictory and will not solve the conundrum we have created, I respectfully dissent?

CLINTON, Judge

DELIVERED: October 7, 1987

EN BANC

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10/ Moore v. State, 574 S.W.2d 122 (Tex.Cr.App. 1978), demonstrates the converse. Accused was indicted for murder, convicted of involuntary manslaughter and on appeal asserted error in failing to charge on criminally negligent homicide.

Footnote 10 continued -

Referring to certain testimony, Judge Dally wrote for a Court panel:

> "This evidence is sufficient to raise an issue of reasonable doubt whether the appellant was aware of but consciously disregarded a substantial but unjustified risk that her conduct would result in the death of deceased [i.e., involuntary manslaughter]. The jury, if it believed this evidence, could have found that appellant ought to have been, but was not, aware that her conduct would create a substantial and unjustifiable risk resulting in the death of the deceased [i.e., criminally negligent homicide].

Id., at 124. Accord: Ormsby v. State, 600 S.W.2d 782 (Tex.Cr. App. 1980).

C.C.A. # 68870
TRIAL COURT # 329,004

THE STATE OF TEXAS	IN THE 230TH JUDICIAL DISTRICT COUR
VS.	OF
PHILLIP DANIEL TOMPKINS	HARRIS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Order of the Court of Criminal Appeals entered April 20, 1987, a hearing was held in the 230th District Court of Harris County, Texas, on June 3rd and 4th, 1987 regarding possible exclusions made in violation of "BATSON" during jury selection in the Defendant's trial for capital murder. The following findings of fact and conclusions of law are made pursuant thereto:

1. The defendant is an identifiable minority, i.e. black.

2. There were no blacks on the jury that tried the defendant and assessed the death penalty.

3. The complained of State's peremptory challenges were exercised against black venirepersons.

   The foregoing facts constitute a prima facia case under BATSON.

4. The venireperson David Miller was excused by the State by the use of a peremptory challenge.

5. Mr. Miller had originally, on questioning by the Court, disqualified under Witherspoon, and was subsequently "rehabilitated" upon questioning by the defense.

6. The State's excusal of Mr. Miller was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

7. The venireperson Belinda Sutphen was excused by the State by the use of a peremptory challenge.

8. Ms. Sutphen had originally, on questioning by the Court, disqualifie under Witherspoon, and was subsequently "rehabilitated" upon questioning by the defense.

9. The State's excusal of Ms. Sutphen was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated. Ms. Sutphen also vascilated in her answers to the extent that she was admonished by the Court during voir dire.

10. Venireperson Isabella Thomas was excused by the State by the use of a peremptory challenge.

11. Ms. Thomas at first said she could not follow the law on circumstantial evidence that was in effect at the time of the voir dire and upon which the State relied for a conviction, and though she later indicated she could follow that law if so instructed by the Court, the prosecutor was skeptical about her ability to do so.

RECORDER'S MEMORANDUM

(F)
11/24/12

12. The State's excusal of Ms. Thomas was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

13. The veniremen Frank E. Samuel was excused by the State by the use of a peremptory challenge.

14. Mr. Samuel, though not illiterate, could not satisfactorily fill out juror information sheets and questionnaires, and obviously had extreme difficulty with legal concepts. The prosecutor felt that he would have great difficulty in understanding the complexities of a capital case. Although less time was spent questioning Mr. Samuel than on some other jurors, it was obvious that that was motivated by what was perceived as Mr. Samuel's inability to understand and comprehend the issues, and not on the fact that he was black.

15. The State's excusal of Mr. Samuel was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

16. The venireperson Leroy Green was excused by the State by the use of a peremptory challenge.

17. Mr. Green testified that over the years he had frequently changed his opinion on the propriety of the death penalty and that his wife was opposed to the death penalty; he frequently made non verbal answers or "yeahs"; there was no valid communication between the prosecutor and the juror. The juror had problems with and vascillated regarding his ability to follow the law of causation and indicated that he might require evidence of premeditation.

18. The State's excusal of Mr. Green was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

Joe Kegans

JOE KEGANS, Judge
230th District Court
Harris County, Texas

FILED
'81 JUL 11 PM 1:44
M. Lopez DEPUTY

STATE'S EXHIBIT 52

STATEMENT OF PERSON IN CUSTODY

Date 1-28-81
Time 8:07PM

Statement of PHILLIP DANIEL TOMKINS
taken in Harris County, Texas.
Prior to making this statement I have been warned by C. WREN the person to whom this statement is made, that:

1) I have the right to remain silent and not make any statement at all and any statement I make may and probably will be used against me at my trial;
2) Any statement I make may be used as evidence against me in court;
3) I have the right to have a lawyer present to advise me prior to and during any questioning;
4) If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and;
5) I have the right to terminate the interview at any time.

Prior to and during the making of this statement I knowingly, intelligently and voluntarily waive the rights set out above and make the following voluntary statement:

Last Sunday night around midnight I was on S. Main near the ROAD RUNNER INN in PIZZA's mothers car. The car is a 1973 MONTE CARLO with a black top and a maroon bottom. While I was out there, I saw this white girl drive by in a light colored small car. The girl was driving south on Main and I followed her. I followed her for about fifteen or twenty mintues and she made a couple of turns. It was foggy and I was smoking a marijuana cigarette and the girl had stopped at a stop sign and I accidently bumped into her from the rear. I was driving real slow when I hit her car. After I hit her, the girl got out and said, "what's the fuck wrong with you?" She was mad because I had bumped into her. I backed up a little bit and put the car in park and got out of the car. She was saying something about calling the cops. I told her that I was sorry and that I didn't mean it. She told me that I should slow down and read the signs. This is when these crazy notions started going through my mine. I saw her holding her purse in her right hand and I was thinking that she might have enough money to get me and PIZZA to Austin. PIZZA is my common law wife, her name is LISA MILES and she is a white girl.

I was thinking about snatching her pocket book but I thought that she would call the cops and I wouldn't get too far so I told her to get into my car. She asked me, "For what?" I told her that I wanted her pocket book and her money. She told me to go ahead and take her pocket book. She told me that she didn't have much money. I told her that I was going to take her with me because I was afraid that she would call the police. At first she said that she wasn't going anywhere. I put my hand on her back and told her to come on. She said, "Don't hurt me". She went on and got into the car with me when I told her that I wasn't going to hurt her. She got into the front seat with me and I drove off. I drove back towards town and over by the ASTRO DOME and down this dirt road, and to this field. There was a house out there and a dog was barking. I took the girl by this tree and tied her up. I just tied her up and I asked her could she breathe. I tied her arms with a blue sheet and I tied her feet with another piece of the blue sheet. I put a piece of the blue sheet in her mouth and then I tied a checkered shirt around her mouth, I think it was blue, so that she couldn't spit out the sheet.

While we was driving back to town, I was telling the girl about me and PIZZA's problems, our financial problems. The girl asked me if we needed

Witness Tomkins
Witness Tommy Steel 10:00 PM 1-28-81
Witness Pat M. Likens 10:00 PM 1-28-81

TC-87-30-157

STATEMENT OF PERSON IN CUSTODY

Date 1-28-81

Time 8:07PM

Statement of PHILLIP DANIEL THOMPKINS

taken in Harris County, Texas.

Prior to making this statement I have been warned by C.WARENT, the person to whom this statement is made, that:

1) I have the right to remain silent and not make any statement at all and any statement I make may and probably will be used against me at my trial;
2) Any statement I make may be used as evidence against me in court;
3) I have the right to have a lawyer present to advise me prior to and during any questioning;
4) If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and;
5) I have the right to terminate the interview at any time.

Prior to and during the making of this statement I knowingly, intelligently and voluntarily waive the rights set out above and make the following voluntary statement:

some money. When I told her that I did, she started pulling out all of the credit cards. She said that she didn't have very much money and that all she had was about $20 and some change. I told her that she didn't have to pull all that stuff out of her purse. She asked me how far was I going to take her from her car and I told her that I was going to take her close to the freeway. She asked me if I would leave her a quarter to call her husband and I told her that I would let her have her whole purse. She told me that if I needed some money that she had a QUICK SILVER BANK CARD. She asked me how much I needed and I told her that I needed about $200 or $300. She said that she would give it to me because she knew that she wouldn't get it back. We laughted about what she said and she gave the card. She told me how to use the card. She said, "Push SICK and then $300". I told her that I was going to tie her up then so she couldn't call the police and the police catch me at the bank. This is when I tied her up. I told her that I would be back in a few minutes and untie her.

I left her tied to the tree. I tied her hands to the tree so that she couldn't get away. She was setting up when I left. I can't remember if I had her hands or her legs tied to the tree. I drove to the bank, she had told me that the bank was at FONDREN at BISSONETT. I parked my car (Lisa's mothers MONTE CARLO) about 100' from the teller. I walked up to the QUICK SILVER teller and put the card in and pushed some buttons like the girl told me to. The machine gave the total. It showed $3,000. I pushed all of the buttons and I messed up. I read what the sign said, and then I pushed a $1,000 and a bunch of money came out, a $1,000. After I got the money or before I got the money, this janitor at the bank came up to me. He was cleaning up around the area, he was cleaning up with a broom. He was putting trash on top of the camper of this blue and white pick up truck. When he came up to me, he asked me what was wrong. I told him that nothing was wrong, that I was checking to see how much money we had in the bank. He went on sweeping up, he said something but I don't know what. I drove down BISSONETT from the bank towards Stella Link. I got to BELLAIRE at BISSONETT and I saw this cab and I waived him down and told him to take me to the bank. I parked my car in a parking lot near another bank and I got into the cab. There was a white guy driving the cab, it was a yellow cab. The white guy looked about 23 or 22. I told him where to go and he took me back to the bank of FONDREN

Witness

Witness

1-28-81

Page 2 of 4 pages

TC-87-30-158

STATEMENT OF PERSON IN CUSTODY

Date 1-28-81

Time 8:07PM

Statement of PHILLIP DANIEL THOMPKINS

taken in Harris County, Texas.

Prior to making this statement I have been warned by C.WARENT, the person to whom this statement is made, that:

1) I have the right to remain silent and not make any statement at all and any statement I make may and probably will be used against me at my trial;
2) Any statement I make may be used as evidence against me in court;
3) I have the right to have a lawyer present to advise me prior to and during any questioning;
4) If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and;
5) I have the right to terminate the interview at any time.

Prior to and during the making of this statement I knowingly, intelligently and voluntarily waive the rights set out above and make the following voluntary statement:

at BISSONETT. I got out and tried to use the card again but it didn't work. The machine said to come back tomorrow. I went back and got into the cab and went back and got my car. I asked the cab driver how to get to STELLA LINK. I know where I was at and how to get there, I was just messing around with him. I got into my car and I drove back to where I had tied the girl up at. When I got there, I parked my car down the road aways because I wanted to walk to where the girl was at. Just in case the police might be there. I walked up in the bushes and looked around. I didn't see anybody. I saw the girl and she wasn't moving. I went up to the girl and she was laying down on the ground and she wasn't moving. I checked her pulse and I couldn't feel one. I got scared and I ran to the car and left. I drove to Telephone road and I stopped on Telephone and called the police. The lady that answered said, "Hello Houston Police". I said, "Hello, I---". I was going to tell her what had happened but I hung up. This was at around 3:00 or 4:00 in the morning. I hung up and drove to EARL NEWBILL's house on Telephone at his apartment #130. He and PIZZA have been staying with them for about three days.

When I got to Earls house he wasn't home. Earl was playing cards and I went to find him. I found him at FRENCHIES trailer house playing BLACK JACK. I played cards for a few minutes with them and me and Earl went back to the house.

I just remembered that I had taken the girls watch when I had tied her up and I put it in her pocket book. It should still be in there. It was a silver watch, small with hands.

That night while we were at EARLS house PIZZA saw the purse and she asked me where I had gotten at. I told her that I had snatched it from some lady. I told her that she could have the purse, and she said that she didn't want it. The next day, she was going to go ahead and make me happy and she took the purse. Early MONDAY morning we headed for AUSTIN sometime around 5AM. While we was going down I 10, I had a flat tire and two black guys stopped to help us. They was in a dark blue CHEVY, I believe it was a Chevy. They took me to a service station and I got my spare tire aired up. The two guys told me that they would sell me two tires and they took me somewhere back toward Houston. They took me to his brothers house, the drivers brother.

Witness

Witness

1-28-81

Page 3 of 4 pages

TC-87-30-159

STATEMENT OF PERSON IN CUSTODY

Date 1-28-81.

Time 6:07PM

Statement of PHILLIP DANIEL THOMPKINS

taken in Harris County, Texas.

Prior to making this statement I have been warned by C.W.KENT the person to whom this statement is made, that:

1) I have the right to remain silent and not make any statement at all and any statement I make may and probably will be used against me at my trial;
2) Any statement I make may be used as evidence against me in court;
3) I have the right to have a lawyer present to advise me prior to and during any questioning;
4) If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and;
5) I have the right to terminate the interview at any time.

Prior to and during the making of this statement I knowingly, intelligently and voluntarily waive the rights set out above and make the following voluntary statement:

When we got to the guys house, his brother had a Monte Carlo and I bough the tires off that car. I paid him $25 for the tires. I gave him $5 for helping me. They drove me back to where our car was at on the freeway. I changed the tire on the car and we drove on to AUSTIN.

While I drove to Austin, I cut off I-10 at COLUMBUS and I drove through La Grange. It was Texas 71 (Highway). Before we got to Columbus we had stopped and spent the night at some Motel. The next day we drove on to Austin and through LaGrange. Somewhere in LaGrange I stopped and threw everything that was in the girls purse in some bushes off the side of the road, I threw everything except the credit cards and the purse away. I think the girls watch is still in the car.

I want to saw that we didn't spent the night at the motel, we stayed there from about 9AM to about 3PM Monday. We got to Austin Monday evening at about 5PM or 6PM. We went to PIZZA's mothers trailer and we stayed there for about two hours and then we checked into a hotel. We checked in at the IMPERIAL 400 HOTEL on S. CONGRESS. This is where we have been staying at.

Today, Wednesday 1-28-81, we drove back to PIZZA's mothers trailer at the KOA CAMP BROUNDS in Austin. This was around about 1PM. We had been there for about two minutes when the cops came there and arrested me and PIZZA. When they handcuffed me, I broke away and run from the police and they caught me. I want to say that PIZZA didn't have nothing to do with what I did. She didn't know about the girl.

I want to say that I have not been promised anything to make this statement. Detective gave me a cup of coffee and I smoked several cigarettes. I have been warned of my rights and I understand them and I want to give this statement. It is the truth to the best of my knowledge.

Phillip Tompkins
Signature of Person Making Statement

Tommy Cattles
Witness

Peter Wood
Witness

Page 1 of 1 pages

APPENDIX C

APPENDIX "A" TC-87-30-154

C.C.A. # 68870
TRIAL COURT # 329,004

THE STATE OF TEXAS	IN THE 230TH JUDICIAL DISTRICT COURT
VS.	OF
PHILLIP DANIEL TOMPKINS	HARRIS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Order of the Court of Criminal Appeals entered April 20, 1987, a hearing was held in the 230th District Court of Harris County, Texas, on June 3rd and 4th, 1987 regarding possible exclusions made in violation of "BATSON" during jury selection in the Defendant's trial for capital murder. The following findings of fact and conclusions of law are made pursuant thereto:

1. The defendant is an identifiable minority, i.e. black.

2. There were no blacks on the jury that tried the defendant and assessed the death penalty.

3. The complained of State's peramptory challenges were exercised against black veniremembers.

   The foregoing facts constitute a prima facia case under BATSON.

4. The veniremember David Miller was excused by the State by the use of a peremptory challenge.

5. Mr. Miller had originally, on questioning by the Court, disqualified under Witherspoon, and was subsequently "rehabilitated" upon questioning by the defense.

6. The State's excusal of Mr. Miller was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

7. The veniremember Belinda Sutphen was excused by the State by the use of a peremptory challenge.

8. Ms. Sutphen had originally, on questioning by the Court, disqualified under Witherspoon, and was subsequently "rehabilitated" upon questioning by the defense.

9. The State's excusal of Ms. Sutphen was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated. Ms. Sutphen also vascilated in her answers to the extent that she was admonished by the Court during voir dire.

10. Veniremember Isabella Thomas was excused by the State by the use of a peremptory challenge.

11. Ms. Thomas at first said she could not follow the law on circumstantial evidence that was in effect at the time of the voir dire and upon which the State relied for a conviction, and though she later indicated she could follow that law if so instructed by the Court, the prosecutor was skeptical about her ability to do so.

RECORDER'S MEMORANDUM
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12. The State's excusal of Ms. Thomas was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

13. The veniremen Frank E. Samuel was excused by the State by the use of a peremptory challenge.

14. Mr. Samuel, though not illiterate, could not satisfactorily fill out juror information sheets and questionnaires, and obviously had extreme difficulty with legal concepts. The prosecutor felt that he would have great difficulty in understanding the complexities of a capital case. Although less time was spent questioning Mr. Samuel than on some other jurors, it was obvious that that was motivated by what was perceived as Mr. Samuel's inability to understand and comprehend the issues, and not on the fact that he was black.

15. The State's excusal of Mr. Samuel was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

16. The venireperson Leroy Green was excused by the State by the use of a peremptory challenge.

17. Mr. Green testified that over the years he had frequently changed his opinion on the propriety of the death penalty and that his wife was opposed to the death penalty; he frequently made non verbal answers or "yeahs"; there was no valid communication between the prosecutor and the juror. The juror had problems with and vascillated regarding his ability to follow the law of causation and indicated that he might require evidence of premeditation.

18. The State's excusal of Mr. Green was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

Joe Kegans

JOE KEGANS, Judge
230th District Court
Harris County, Texas

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Texas Code of Criminal Procedure:

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorise the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Added by Acts 1973, 63rd Leg., p. 1125, ch. 426, art. 3, § 1, eff. June 14, 1973.

Texas Penal Code:

§ 6.03. Definitions of Culpable Mental States

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

§ 19.02. Murder

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

Amended by Acts 1973, 63rd Leg., p. 1123, ch. 426, art. 2, § 1, eff. Jan. 1, 1974.

§ 19.03. Capital Murder

(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Amended by Acts 1973, 63rd Leg., p. 1123, ch. 426, art. 2, § 1, eff. Jan. 1, 1974.

Supreme Court, U.S.
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NO. 87-6405

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

PHILLIP D. TOMPKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court erred in failing to give Tomplins' requested jury instructions on the lesser included offenses of involuntary manslaughter and criminally negligent homicide.

2. Whether the prosecution rebutted Tompkins' claim under Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986).

3. Whether the Texas capital sentencing scheme is constitutionally infirm.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	2
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT	3
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.	3
II. TOMPKINS WAS NOT ENTITLED, AS A MATTER OF STATUTORY CONSTRUCTION OF TEXAS LAW, TO AN INSTRUCTION ON THE LESSER INCLUDED OFFENSES OF INVOLUNTARY MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE.	3
III. THE PROSECUTION REBUTTED TOMPKINS' CLAIM UNDER BATSON V. KENTUCKY, ___ U.S. ___, 106 S.CT. 1712 (1986)	6
IV. TOMPKINS' CHALLENGE TO THE TEXAS STATUTORY SCHEME IS NOT PROPERLY BEFORE THIS COURT.	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986)	3,6
Beck v. Alabama, 477 U.S. 625 (1980)	3,4,5
Franklin v. Lynaugh, No. 87-5546	3,7
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949)	5
Hopper v. Evans, 456 U.S. 605 (1982)	4,5
Smith v. Phillips, 455 U.S. 209 (1982)	4
Tacon v. Arizona, 410 U.S. 352 (1973)	4,6,7

Constitutions, Statutes and Rules	
U. S. Const., amend. V	2
U. S. Const., amend. VIII	2
U. S. Const., amend. XIV	2
28 U.S.C. § 1257(3)	2
Sup. Ct. R. 17	3
Tex. Code Crim. Proc. Ann. art. 37.071	2
Tex. Penal Code Ann. § 6.03	2
Tex. Penal Code Ann. § 19.02	2
Tex. Penal Code Ann. § 19.03	2
Tex. Penal Code Ann. § 19.05	2
Tex. Penal Code Ann. § 19.07	2

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THE STATE OF TEXAS,

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On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The Opinion of the Texas Court of Criminal Appeals is attached to the petition as Appendix A. Tompkins v. State, ___ S.W.2d ___, No. 68,870 (Tex. Crim. App. Oct. 7, 1987). Tompkins' motion for leave to file motion for rehearing was denied without written order.

[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Tompkins."

JURISDICTION

Tompkins seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Tompkins bases his claims on the fifth, eighth and fourteenth amendments to the United States Constitution. Also involved herein are Tex. Code Crim. Proc. Ann. art. 37.071 and Tex. Penal Code Ann. §§ 6.03, 19.02, 19.03, 19.05 and 19.07, copies of which are attached to the petition as Appendix D.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On January 30, 1981, Tompkins was indicted for the capital murder of Mary D. Berry. The indictment alleged that on or about January 26, 1981, Tompkins killed Berry while in the course of committing and attempting to commit the offenses of robbery and kidnapping of Berry. Tompkins pled not guilty and was tried by a jury, which, on June 11, 1981, found him guilty as charged. On June 15, 1981, following a separate hearing on punishment, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071, and thereafter the trial court assessed punishment of death. On October 7, 1987, the Court of Criminal Appeals affirmed the conviction. Tompkins v. State, ___ S.W.2d ___, No. 68,870 (Tex. Crim. App. Oct. 7, 1987).

B. Statement of Facts

The state is in substantial agreement with Tompkins' statement of the facts.

SUMMARY OF ARGUMENT

There are no special and important reasons to consider the questions presented.

Tompkins' claim that the trial court erred in failing to instruct the jury on two lesser included offenses is without merit. The court below found, as a matter of statutory construction of Texas law, that such offenses were not raised by the evidence, and this Court should defer to the Texas court's

interpretation of state law. Moreover, the jury was afforded the opportunity to convict Tompkins of a non-capital offense inasmuch as the trial court did give an instruction on the lesser included offense of murder.

Tompkins' claim under Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986), is also meritless. Both the trial court and the state appellate court below specifically found that the prosecutor's explanations for the exercise of his peremptory challenges sufficiently rebutted Tompkins' prima facie Batson claim. Tompkins asks this Court to grant certiorari merely to review the factual findings and credibility choices of the courts below.

Finally, there is no merit to Tompkins' attempt to bring his case within the ambit of Franklin v. Lynaugh, No. 87-5546, currently pending in this Court. Tompkins raised no such claim in the court below and his trial court challenge to the constitutionality of the Texas capital sentencing scheme was on grounds other than those presented in Franklin. Thus, this Court is without jurisdiction to consider this claim.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Tompkins has advanced no special or important reason in this case, and none exists.

II.

TOMPKINS WAS NOT ENTITLED, AS A MATTER OF STATUTORY CONSTRUCTION OF TEXAS LAW, TO AN INSTRUCTION ON THE LESSER INCLUDED OFFENSES OF INVOLUNTARY MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE.

Tompkins, relying on Beck v. Alabama, 477 U.S. 625 (1980), argues that the trial court erred in refusing his requested instructions on the lesser included offenses of involuntary

manslaughter and criminally negligent homicide. In Beck, the Court held that a sentence of death could not be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense, where the evidence would have supported such a verdict. The Court struck down an Alabama preclusion clause which proscribed the giving of such an instruction in capital cases, finding that it introduced "a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." Id. at 643. In Beck, there was no question that the defendant would have been entitled to such an instruction but for Alabama's preclusion clause. Id. at 629-30.

Subsequently, in Hopper v. Evans, 456 U.S. 605 (1982), the Court made clear that "due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." Id. at 611 (original emphasis). There, the Court concluded that no such instruction had been required because there was no evidence to support it.

Here, the Texas appellate court found, as a matter of state law, that the evidence adduced at trial did not raise the lesser included offenses of involuntary manslaughter and criminally negligent homicide. Appendix A at 21-25. Thus, Tompkins' request for certiorari review of this issue should be denied for two reasons. First, it is nothing more than an invitation to this Court to second-guess the Texas court's interpretation of its own law, an undertaking which is outside the ambit of the Court's certiorari jurisdiction. See Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

Second, Tompkins' claim concerns only the application of Beck and Hopper to his particular factual situation. This Court sits to decide important, novel or recurring questions, not rulings founded on settled principles of law. Tacon v. Arizona,

410 U.S. 352, 353 (1973); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

Moreover, even if the court below decided this matter incorrectly as a matter of Texas law, the writ should not issue because Tompkins could not have been prejudiced by the trial court's refusal of his requested instructions. The rationale of Beck is that, when raised by the evidence, a lesser included offense must be submitted to the jury as "a third option of finding that although the defendant had committed a grave crime, it was not so grave as to warrant capital punishment." Hopper, 456 U.S. at 609. Here, the jury was given the third option of finding Tompkins guilty of the lesser included offense of murder (See Petition at 12). Due process was thus satisfied. The Constitution does not require that the jury be instructed on every conceivable lesser included offense. See Beck, 447 U.S. at 630 n.5.

Finally, Tompkins misrepresents the holding of the court below in asserting that the Texas court read "Beck to require that the defendant testify or present evidence in order to receive the protections of Beck." (Petition at 11). In fact, the Texas rule is directly contrary to that suggested by Tompkins:

> In determining whether a defendant is entitled to a charge on a lesser included offense, this Court considers all the evidence presented. If evidence from any source raises the issue of a lesser included offense an instruction on that offense must be included in the court's charge to the jury.

(Appendix A at 20) (citations omitted). Rather than requiring that a defendant testify or present evidence to create a Beck issue, as Tompkins suggests, the Texas court simply observed that in Beck the issue was raised by the defendant's testimony, whereas here there was no evidence which raised the issue.

III.

THE PROSECUTION REBUTTED TOMPKINS' CLAIM UNDER BATSON V. KENTUCKY, ___ U.S. ___, 106 S.CT. 1712 (1986).

Under Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986), once a criminal defendant establishes a prima facie showing of racial discrimination in the prosecutor's exercise of his peremptory challenges, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." Id. at ___, 106 S.Ct. at 1723. Here, the court below found that Tompkins had established a prima facie case, but that it had been rebutted because "the prosecuting attorneys articulated at the hearing racially neutral explanations, which were both plausible and unambiguous, for exercising their peremptories on the five complained about venirepersons." Appendix A at 9. In so holding, the court adhered to the well settled rule of appellate review that "[w]e do not substitute our judgment of the witnesses' credibility and evidentiary weight for those of the factfinder, but affirm those judgments whenever the record discloses sufficient evidence in their support." Id. at 7.

Tompkins does not, because he cannot, argue that the court below applied an improper constitutional standard. Instead, he asserts that the Texas appellate court should not have deferred to the trial court's credibility determinations because of other, "objective evidence" in the record which, he argues, cast doubt on the prosecutor's explanations. This disingenuous argument ignores one salient fact, i.e., that the "objective evidence" upon which Tompkins relies never was presented to the trial court for its consideration. Thus, in refusing to consider this evidence, the court below did nothing more than adhere to the time-honored rule that an appellate court will not consider matters not raised in the court below, a rule to which this Court has consistently followed. E.g., Tacon v. Arizona, supra.

IV.

TOMPKINS' CHALLENGE TO THE TEXAS STATUTORY SCHEME IS NOT PROPERLY BEFORE THIS COURT.

Tompkins contends that "[t]his case also presents an issue identical to the issue currently before the Court in Franklin v. Lynaugh, . . . " No. 87-5546. Again, Tompkins asks the Court to consider an issue not raised in the court below. Indeed, Tompkins concedes as much (Petition at 6, 23).

Moreover, even the issue which Tompkins raised at the trial court level is not the same as that in Franklin. At trial, Tompkins moved to quash the indictment on grounds wholly unrelated to Franklin (Transcript, hereinafter "Tr.," at 113). Tompkins also filed a motion to have the Texas capital sentencing statute declared unconstitutional (Tr. 99). Neither instrument raised the issue posed in Franklin, i.e., whether the trial court must specifically instruct the jury to consider certain evidence as mitigating. Finally, Tompkins' citation to pages 9-31 of Volume IV of the record (Petition at 6, 23) apparently is in error, as the undersigned has examined the original record, and no such motion or ruling is found on those pages. Because the question presented in Tompkins' petition in this Court was not raised in the trial court or the appellate court below, this Court is without jurisdiction to consider it. Tacon v. Arizona, supra.

CONCLUSION

For these reasons, the state respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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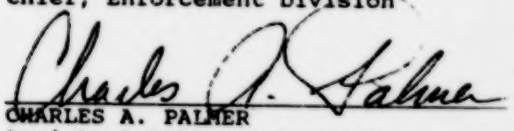

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PHILLIP D. TOMPKINS,

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REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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STATE OF TEXAS,

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REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Phillip D. Tompkins, respectfully files this Reply Brief to the Respondent's Brief in Opposition.

ARGUMENTS

In urging that the issues raised by Tompkins are not certworthy, Respondent fails to recognize that Tompkins raises three important constitutional issues. First, Tompkins raises an important constitutional issue regarding the proper interpretation and application of this Court's decision in Beck v. Alabama, 477 U.S. 625 (1980). Second, contrary to Respondent's assertion that Tompkins' Batson claim raises only a factual issue, Tompkins asserts that the court below incorrectly applied the standard announced in Batson v. Kentucky, 476 U.S. 79 (1986), thereby violating Tompkins' due process rights. Third, contrary to Respondent's assertion, Tompkins' case presents an issue identical to the issue presented before this Court in Franklin v. Lynaugh, No. 5546 (certiorari granted October 9, 1987).

I. THE COURT OF APPEALS VIOLATED THIS COURT'S HOLDING IN BECK v. ALABAMA BY AFFIRMING THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF INVOLUNTARY MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE.

The court of appeals upheld the trial court's refusal to include requested jury charges for involuntary manslaughter and criminally negligent homicide on the grounds that no evidence existed in the record to warrant those charges. The court of appeals reached that conclusion by reasoning that was both circular and internally inconsistent: it found that a charge of involuntary manslaughter was unwarranted because the evidence supported only a finding of negligence, rather than the requisite recklessness, while at the same time finding that a charge of criminally negligent homicide was unwarranted because the evidence supported only a finding of recklessness, rather than the requisite negligence. See Petition for Certification at 10.

Respondent does not defend or even address the court's reasoning. Instead, Respondent attempts to shield that reasoning from review by characterizing the issue as one of state law. However, the issue of whether a defendant in a capital murder case is entitled to a jury charge for a lesser included offense is a matter of federal due process, and federal, not state, law therefore governs its resolution. Cf. Jackson v. Virginia, 443 U.S. 307 (1979) (where this Court held that a federal standard governs the determination of whether sufficient evidence exists to support a criminal conviction for purposes of federal due process); Hopper v. Evans, 456 U.S. 605, 612 (1981) (where this Court implied that a federal standard governs the determination of whether sufficient evidence exists to require a lesser included offense charge in a capital murder case). See Cordova v.

Lynaugh, No. 87-5547, slip op. at 7-8 (5th Cir. Feb. 17, 1988). (See Attachment A.)

This case raises two significant issues regarding the proper interpretation of Beck that should be resolved by this Court. First, the court of appeals misread Beck as requiring Tompkins to testify or present evidence regarding his intent before Beck would require that the jury be charged on a lesser included offense. This interpretation of Beck creates the "intolerable" result that "one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394 (1968). Accord United States v. Salvucci, 448 U.S. 83, 89-90 (1980); Lefkowitz v. Cunningham, 431 U.S. 801, 806-07 (1977); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972).

Second, this case presents an important question regarding the meaning of the "third option" required by Beck. Respondent argues that the failure to charge the jury on the lesser included offenses of involuntary manslaughter and criminally negligent homicide was "harmless" because the trial court's charge as to intentional (non-capital) murder provided the jury a "third option" between convicting Tompkins of capital murder, where a rational jury could have been unconvinced that Tompkins intended to commit murder, and acquitting Tompkins, where Tompkins had obviously committed a serious crime. But in Tompkins' case, a charge of intentional murder was not a viable "third option." Based on the evidence, it would have been impossible for the jury to convict Tompkins of intentional murder because if the jury found that Tompkins had intentionally committed murder, the evidence would have compelled it to find that the murder had occurred in the course of either a kidnapping, robbery, or attempted robbery, thereby giving rise to a verdict of

capital murder. Consequently, the trial court's failure to include a charge on either involuntary manslaughter or criminally negligent homicide effectively gave the jury no option but to convict Tompkins of capital murder or to acquit him. Because Beck requires the jury to be given a viable "third option" where there is evidence to support it, the trial court's failure to charge the jury on the requested lesser included offenses deprived Tompkins of his due process rights under Beck.

II. THE COURT OF APPEALS INCORRECTLY APPLIED THE FOURTEENTH AMENDMENT PROTECTIONS PROMULGATED IN BATSON v. KENTUCKY.

Contrary to Respondent's assertion, Tompkins has challenged the court of appeal's application of the standard of review announced by this Court in Batson v. Kentucky, 476 U.S. 79 (1986). The court of appeals did not apply the careful standard of review required to ensure that the Fourteenth Amendment protections promulgated in Batson become meaningful. The court of appeals did not weigh the trial court's credibility determinations against other evidence in the record which the court of appeals acknowledged "cast considerable doubt" on the prosecutor's explanations. Instead, the court rubber-stamped the trial court's findings.

Respondent also claims that the court of appeals correctly chose to ignore the juror comparison presented in Tompkins' supplemental brief because this evidence was not presented to the trial court. However, this was not new evidence, but merely a compilation of evidence gathered from the record which the trial court had before it during the Batson hearing. Therefore, the court of appeals erred in refusing to consider this evidence.

III. TOMPKINS SHOULD BE HELD PENDING THIS COURT'S DETERMINATION OF FRANKLIN v. LYNAUGH.

Respondent argues that Tompkins does not present the same issue as Franklin v. Lynaugh, No. 87-5546 (certiorari granted October 9, 1987). However, both counsel for Franklin, on appeal, and counsel for Tompkins in a pre-trial Motion to Quash, challenged the constitutionality of Texas' sentencing procedure for capital murder on the grounds that the procedure does not permit the jury to consider mitigating evidence if that evidence is not directly relevant to one of the two statutory sentencing questions. Counsel for Tompkins argued:

> In the Jurek case, the Court stated that question 2 can be interpreted to allow mitigating evidence to come forward, but there's nothing to guide the jury in each individual case . . . on how to handle mitigating circumstances . . . . [T]he jury is asked under their oaths to follow the law, and there's no framework in the issues to allow mitigating circumstances or mercy.

R. Vol. IV at 23-24. See also R. Vol. IV at 11, 16, 27, 28, 29 (Attachment B). It is true that Tompkins' counsel did not request jury instructions as did Franklin's counsel, but that merely goes to the form of the challenge, not the substance. (It would have been futile for Tompkins to request jury instructions regarding mitigating evidence when his previous motion challenging the identical defect had been denied.) Therefore, Tompkins asks this Court to hold the petition on this issue until the Court decides Franklin and to return this case to the Texas courts for further consideration in light of this Court's decision in Franklin.

CONCLUSION

WHEREFORE, for the foregoing reasons, Tompkins respectfully requests this Court to issue a writ of certiorari to the Texas Court of Criminal Appeals. In the

alternative, the Court may wish to defer the disposition of the petition pending its decision in Franklin v. Lynaugh, No. 87-5546 (certiorari granted October 9, 1987).

Respectfully submitted,

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Dated: May 5, 1988

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION and ATTACHMENTS to be served upon the State of Texas on May 5, 1988, by mailing a copy thereof, first-class postage prepaid, to:

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Emmett B. Lewis

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-5547

GEORGE CORDOVA,

Petitioner-Appellant,

versus

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Texas

(Febtuary 17, 1988)

Before REAVLEY, GARWOOD and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

George Cordova, sentenced to death by a Texas court for the murder-robbery of Joey Hernandez, appeals the denial of the writ of habeas corpus. Our examination of the record reveals that the state trial court violated Cordova's due process rights by failing to instruct on the lesser included offense of murder. We

reverse and remand with directions to conditionally grant the writ.

I.

Jose (Joey) Hernandez and Cynthia West in the early morning hours of August 4, 1979 "parked" in a small parking lot in Espada Park in San Antonio, Texas. As Hernandez and West talked in the car, George Cordova approached and asked for oil. Hernandez replied that he did not have any and Cordova left. At around 2 a.m., Cordova returned with Manuel Villanueva and two other men.

When Hernandez reached to start the car, he was struck in the face by one of the men. The car door was opened and Cordova and Villanueva started beating Hernandez. West saw Cordova strike Hernandez with a tire iron and Villanueva attack him with a knife. Cordova took West's wrist and forced her to run into a wooded area of the park. Along the way, Cordova threatened to do to her what he did to Hernandez. West was then forced to the ground face down and Cordova stuck the tire iron next to her face and again threatened her. Cordova made West stand up and run further into the woods, where he undressed her, taking her watch and a necklace. She was raped by Cordova, Villanueva, and a third man. After the attackers departed, West dressed and ran back to the parking lot. There, she discovered that the car was gone and Hernandez was lying dead in a pool of blood.

When Villanueva was arrested shortly after the crime, he had

a bloodied knife in his possession. Leon Springs testified that Villanueva returned home on August 4 with a bloody shirt. Springs turned over to police some 8-track tapes which belonged to Hernandez, together with Hernandez's watch and empty wallet. Springs testified that Villanueva had given him the property. Two cassette boxes, identified as belonging to Hernandez, were recovered from Villanueva's sister who had received them from Villanueva. West's watch was also recovered from Villanueva's house. Hernandez's car was discovered on a street about 2 1/2 blocks from Villanueva's house, and approximately the same distance from the house where Cordova lived.

Cordova was indicted for capital murder. Specifically, he was charged with intentionally causing the death of Hernandez by stabbing him with a knife while in the course of committing and attempting to commit a robbery of Hernandez. Tex. Penal Code Ann. § 19.03(a)(2) (Vernon 1974).

The testimony at trial consisted mainly of West's account, as related above, of the events of August 4. She positively identified Cordova and Villanueva. Other testimony established where the car and other property was found. Besides West's identification, the only other evidence connecting Cordova to the criminal activity was Leon Springs' testimony that he was at the Villanueva house on the evening of August 3 when he saw Cordova come and pick up Villanueva and Villanueva's sister's testimony

that she saw Cordova with Villanueva on August 6. There was no physical evidence linking Cordova to the crime and no stolen property was found on Cordova or in his house.

The medical evidence introduced showed that Hernandez had wounds on his face that could have been caused by a tire iron. However, the cause of death was a stab wound to the back of the neck.

After the close of the evidence, Cordova's counsel objected to the failure to include an instruction on the lesser included offense of murder. The trial court overruled the objection.

The jury found Cordova guilty of capital murder. After presentation of evidence at the punishment stage, the jury answered "yes" to both special issues submitted to it. See Tex. Crim. Proc. Code Ann. art. 37.071(b) (Vernon 1981 & Supp. 1987). Cordova was then sentenced to death. Tex. Crim. Proc. Code Ann. art. 37.071(c)-(e).

The Texas Court of Criminal Appeals affirmed Cordova's conviction and sentence. Cordova v. State, 698 S.W.2d 107, 110-11 (Tex. Crim. App. 1985), cert. denied, 106 S.Ct. 1942 (1986). In addressing Cordova's claim that the trial court erred in refusing to instruct on the lesser included offense, the court stated:

> In determining whether a defendant is entitled to a charge on a lesser included offense we will consider all the evidence presented at trial. [In doing so], this Court [applies a]

> two-prong test. . . . The first prong requires that the lesser included offense must be included within the proof necessary to establish the offense charged. Secondly, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense.
>
> The defendant did not testify nor did he offer any testimony which might reasonably raise any lesser included offenses. The fact that the State in proving capital murder may also have proved a lesser offense does not entitle a defendant to a charge on the lesser offense. There is no evidence in the record that the appellant was guilty of only a lesser included offense.

Id. at 113 (citations omitted).

After exhausting his state court remedies, Cordova brought a habeas action raising a number of issues. The district court denied relief and Cordova appeals. We need only address the issue of failure to instruct on the lesser included offense of murder.[1]

II.

A.

In Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 2390,

[1] Our order of retrial moots all of Cordova's other claims except for his claim that the evidence was insufficient to show that the murder was during the course of robbery. A finding of insufficiency of the evidence would implicate double jeopardy concerns. See, e.g., United States v. Sneed, 705 F.2d 745, 747-49 (5th Cir. 1983). However, as our discussion on the lesser included offense makes clear, see infra § II (C), the evidence was sufficient to prove that the murder was in the course of a robbery of Hernandez.

65 L.E.2d 392 (1980), the Supreme Court invalidated, on due process grounds, a provision of the Alabama death penalty statute that precluded the jury from being instructed on a lesser included noncapital offense. As explained in Hopper v. Evans, 456 U.S. 605, 610, 102 S.Ct. 2049, 2052, 72 L.Ed.2d 367 (1982), Beck stands for the proposition that "the jury [in a capital case] must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict.'" Although Beck, strictly speaking, "holds only that a state cannot impose a blanket ban on the giving of lesser-included-offense instructions in a capital case," Reddix v. Thigpen, 805 F.2d 506, 511 (5th Cir. 1986), we have consistently held that Beck's holding applies when the state trial court refuses a lesser included offense instruction. See Reddix, 805 F.2d at 511-12 (applying Beck but finding no violation because evidence did not support lesser included offense); Bell v. Watkins, 692 F.2d 999, 1004-05 (5th Cir. 1982), cert. denied, 464 U.S. 843 (1983) (same).[2]

The federal standard "is that a lesser included offense instruction should be given 'if the evidence would permit a jury

[2] A plain reading of Beck and Hopper inexorably leads to the same conclusion. If due process is violated because a jury cannot consider a lesser included offense that the "evidence would have supported," Beck, 447 U.S. at 627, 100 S.Ct. at 2384, the source of that refusal, whether by operation of state law or refusal by the state trial court judge, is immaterial.

rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater.'" Hopper, 456 U.S. at 612, 102 S.Ct. at 2053 (quoting Keeble v. United States, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973)). As the Supreme Court noted, the states have varied "in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included instruction . . . ." Beck, 447 U.S. at 636 n.12, 100 S.Ct. at 2389 n.12. Without denigrating any state's standard, including Texas',[3] we conclude that the federal standard -- a lesser included instruction must be given when a jury could rationally convict of the lesser offense and acquit on the greater offense -- is equivalent to the Beck standard that a lesser included instruction must be given when the evidence would have supported such a verdict. In other words, due process and the Eighth Amendment require that, in a capital case, the jury must be allowed to consider a lesser included noncapital offense

[3] As explained in Cordova, 698 S.W.2d at 113, Texas courts apply a two prong test for lesser included offenses. The first prong, "that the lesser included offense must be included within the proof necessary to establish the offense charged," is, apparently, nothing more than a requirement that the lesser included offense really be a lesser included offense. The second prong that "there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense," seems very similar to the federal standard.

However, we are not concerned about the Texas standard or its possible misapplication to the facts here. Instead, we only address the issue of whether due process required that Cordova's jury be given a lesser included instruction.

if the jury could rationally acquit on the capital crime and convict for the noncapital crime.

That we equate the federal standard with the Beck requirement is not momentous. Both Beck and Hopper talk of the federal standard and, at least impliedly, adopt it. See Beck, 447 U.S. at 635-37, 100 S.Ct. at 2388-89; Hopper, 456 U.S. at 611-12; 102 S.Ct. at 2053. Similarly, our cases have also used the federal standard in the Beck situation. Bell, 692 F.2d at 1004-05; Reddix, 805 F.2d at 512. Beck rested on the proposition that when "the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." 447 U.S. at 637, 100 S.Ct. at 2389. The federal standard, by looking at what a rational juror could do, given the evidence, directly addresses that risk. Finally, the attorney for Texas conceded at oral argument that the federal standard was proper in the Beck situation.

The issue here is whether a rational juror, given all the facts, could have acquitted Cordova of capital murder and convicted him of a lesser included offense. An understanding of the laws of Texas is necessary to answer that issue.

B.

Cordova was indicted for, and convicted of, capital murder. Specifically, the indictment charged that Cordova murdered Hernandez during the course of robbery of Hernandez. The capital murder statute in Texas, Tex. Crim. Code Ann. § 19.03 (Vernon 1974) provides, in pertinent part:

> (a) a person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
>
> . . .
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit . . . robbery . . . .[4]

[4] The statute, at the time of Cordova's crime, read in full:

> (a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
>
> (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;
> (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
> (4) the person commits the murder while escaping or attempting to escape from a penal institution; or

Section 19.02(a)(1) of the Texas Penal Code, defines murder: "A person commits an offense if he: (1) intentionally or knowingly causes the death of an individual."

That the murder must have been committed "in the course of committing . . . robbery," § 19.03(a)(2), means that the conduct

> (5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.
>
> (b) An offense under this section is a capital felony.
>
> (c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Tex. Crim. Code Ann. § 19.03 (Vernon 1974).

The statute was later amended to change "aggravated rape" to "aggravated sexual assault" in subsection (a)(2) and to add to section (a):

> (6) the person murders more than one person:
>
> (A) during the same criminal transaction; or
> (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

Tex. Crim. Code Ann. § 19.03 (Vernon Supp. 1988).

We note that the indictment did not charge Cordova with the murder of Hernandez during the course of aggravated rape or robbery of West. Instead, the only allegation that made the murder capital was the robbery of Hernandez.

causing the death occurred "in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of [the] . . . robbery," Fierro v. State, 706 S.W.2d 310, 313 (Tex. Crim. App. 1986) (quoting Riles v. State, 595 S.W.2d 858, 862 (Tex. Crim. App. 1980)). If a robbery is committed as an "afterthought" and unrelated to the murder, it is simple murder and not capital murder. O'Pry v. State, 642 S.W.2d 748, 762 (Tex. Crim. App. 1982). In other words, as charged by the indictment, the state had to prove that Cordova intentionally[5] caused the death of Hernandez, in an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of robbery of Hernandez.

The law of parties applies to the guilt phase of a capital murder trial. Cordova, 698 S.W.2d at 111; English v. State, 592 S.W.2d 949, 955 (Tex. Crim. App.), cert. denied, 449 U.S. 891 (1980); see Tex. Penal Code Ann. §§ 7.01, 7.02 (Vernon 1974) (law of parties). The Texas Court of Criminal Appeals explained the law of parties in Cordova, 698 S.W.2d at 111 (citations omitted):

> Evidence is sufficient to convict the

[5] Although murder is defined in Tex. Penal Code Ann. § 19.02(a)(1) as "knowingly or intentionally" causing the death, § 19.03(a)(2) specifies that the murder must be intentional in these circumstances. Intentional is the requisite mental state; murder committed knowingly during the course of robbery is not capital murder under § 19.03(a)(2). Demouchette v. State, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986), cert. denied, 107 S.Ct. 3197 (1987).

> defendant under the law of parties where he is physically present at the commission of the offense, and encourages the commission of the offense either by words or other agreement. The agreement, if any, must be before or contemporaneous with the criminal event. To convict someone as a party to an offense, the evidence must show that at the time of the offense the parties were acting together, each doing some part of the execution of the common purpose. In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act.

As the Court of Criminal Appeals has stressed, the agreement must be prior to the act. See Randolph v. State, 656 S.W.2d 475, 477 (Tex. Crim. App. 1983) (subsequent agreement to fabricate a story with no evidence of prior agreement was insufficient for murder conviction).

Finally, we conclude with relevant Texas law by noting that murder is a lesser included offense of capital murder. See Tex. Penal Code Ann. § 19.03(c) (If the jury does not find the defendant guilty of capital murder, it may convict him "of murder or any other lesser included offense.").

c.

In order to prove capital murder, the state had to show that Cordova intentionally murdered Hernandez, either personally or as a party, while in the course of robbing Hernandez, either personally or as a party. The specific issue is whether a

rational jury could have found that Cordova murdered Hernandez but that it was not in the course of the robbery. If so, the trial court violated due process by not instructing on the lesser included offense of murder.

A brief review of the evidence shows that Cordova and Villanueva approached and attacked Hernandez. Cordova then took West off into the woods where he raped her. Cordova went off while two other men raped West. He then returned and everybody left. West's own testimony proved that Cordova participated in her rape and the murder of Hernandez. The proof of Cordova's participation in the robbery of Hernandez is only circumstantial and far from certain. Hernandez was definitely robbed: his car was found abandoned and his watch and wallet and other items were given to police by people who said Villanueva gave the items to them. But the sequence of events tends to show that Cordova did not personally commit the robbery of Hernandez. Cordova was with West most of the time. West testified that when he left her, Cordova went in the direction of the cars on the dirt road. She did not testify that he went in the direction of the parking lot where Hernandez lay.

The state contends that Cordova is guilty as a party. They point to him as the leader of the gang, since he did the talking, and the fact that he robbed West. The state concludes that this shows he had a prior agreement to rob Hernandez. We agree that

the jury could infer that Cordova had a prior agreement to rob Hernandez.[6] The problem is that the jury could reject that inference. Given the lack of evidence of Cordova's personal participation in the robbery, as well as the fact that none of the stolen items were traced to Cordova,[7] a rational jury could conclude that Cordova did not have a prior agreement to rob Hernandez.

The state points to the fact that Cordova robbed West to show his larcenous intent. The state also argues that the evidence is conclusive on the robbery because there is no other reason to attack Hernandez. We disagree. The fact that Cordova robbed West simply does not establish conclusively that he had the same intent to rob Hernandez. Indeed, Cordova let West keep her high school ring, indicating that he was not all that interested in robbery. As for the purpose of the attack, Cordova seemed most interested in raping West. It is at least arguable that his purpose throughout was to rape West, not to rob Hernandez.

Given all of the evidence, especially Cordova's lack of personal participation in the robbery of Hernandez and the fact

[6] See supra n.1.

[7] Hernandez's car was found equi-distant between Cordova's and Villaneuva's houses in a heavily residential area. That evidence does not necessarily prove that Cordova stole it.

that no stolen property was traced to him, we conclude that a rational jury could have concluded that Cordova had no "prior agreement or common purpose," Cordova, 698 S.W.2d at 112, to rob Hernandez. It could then have acquitted Cordova of capital murder, and found him guilty of murder. Since the trial court refused to instruct on the lesser included offense of murder, and the "evidence would have supported such a verdict," Cordova's due process rights were violated. Hopper, 456 U.S. at 610, 102 S.Ct. at 2052.

To recapitulate, the evidence would support the jury in finding either that Cordova planned the robbery of Hernandez or that he did not so plan. The proof of Cordova's agreement to rob Hernandez, unlike the proof of his intent to kill Hernandez, was circumstantial and ambiguous. If properly instructed, therefore, the jury could have found Cordova guilty of either simple murder or capital murder. Without the instruction on the lesser included offense of murder, the choice given to the jury in this trial was between conviction for capital murder and acquittal. The pressure to avoid acquitting so reprehensible an actor, driving the jury toward conviction for (robbery) capital murder, registers the due process and Eighth Amendment violations.[8]

[8] We note that the type of constitutional error here can never be harmless. See Hopper, 456 U.S. at 610, 102 S.Ct. at 2052 (Jury in capital case "must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the

IV.

The judgment of the trial court denying the writ is reversed. We remand and instruct the trial court to grant the writ conditioned upon the retrial of Cordova by the State of Texas.

REVERSED and REMANDED.

evidence would have supported such a verdict.'") (emphasis added). By the very nature of the error, that the jury could have rationally convicted of a less than capital offense but was not allowed to consider the offense by the jury instructions, precludes any harmless error analysis.

The nature of the initial inquiry itself is very similar to a harmless error anaylsis. If the instruction was refused, but the jury could not rationally convict on the lesser offense, then the alleged error would be harmless. In other words, the harm is subsumed in the test itself.

ATTACHMENT 3

APPELLATE COURT NO. _____

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

AT AUSTIN

PHILLIP DANIEL TOMPKINS,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM THE 230TH DISTRICT COURT OF HARRIS COUNTY, TEXAS. Judge Joe Kegans, Presiding

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STATEMENT OF FACTS

FILED
RAY HARDY
District Clerk
AUG 0 4 1981
Time _____
Harris County, Texas
By _____ Deputy

SHARON COOK
Certified Court Reporter
230th District Court
Harris County, Texas

ATTACHMENT 8

APPELLATE COURT NO. _____

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

AT AUSTIN

PHILLIP DANIEL TOMPKINS,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM THE 230TH DISTRICT COURT OF HARRIS COUNTY, TEXAS. Judge Joe Kegans, Presiding

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STATEMENT OF FACTS

FILED
RAY HARDY
District Clerk
AUG 0 4 1981
Time _____
Harris County, Texas
By _____ Deputy

SHARON COOK
Certified Court Reporter
230th District Court
Harris County, Texas

Quash the indictment and the Motion to Hold Article 37.07-1 of the Texas Code of Criminal Procedure unconstitutional because they are basically the same comment that would apply to both motions in addition to what is presented in the motion itself.

THE COURT: All right, sir.

MR. DOWELL: Your Honor, basically, we would ask that the provision of Article of 37.07-1 of the Code of Criminal Procedure be held unconstitutional because it is mandatory in nature. Mandatory statutes have been held to be violative of the Constitution in Furman versus Georgia, 408 U.S. 283-1972 and the United States Supreme Court case and Woodson versus North Carolina, 428 U.S. 280-1976, Supreme Court case as well as Roberts versus Louisiana, 428 U.S. 325-1976 case.

Judge Odom in the Texas Court of Criminal Appeals in a dissenting opinion in the state case holding the provision constitutional noted that the trial Court is required to submit specific issues to the jury. The jury is required to make determinations based on those special issues. If answered affirmatively, the

trial Court is required to assess the death penalty. It is clear that the statute is specifically mandatory by the specific mandatory terminology that is used and the total lack of permissive language that is omitted from the statute.

We cannot presume that the jury will violate their oath in order to grant mercy in a particular case. The case of Furman and Woodson and Roberts, which we quoted, illustrate that the mandatory sentencing in the death penalty cases are violated by the Constitution because they are unduly harsh in the nature and violate the Eighth and Fourteenth Amendments, and forces the jury's evasion of the issues submitted, in the event the jury finds by acquittal, or a lesser included offense, is a proper punishment. The Texas statute differs materially from the Louisiana statute, which is rejected in Roberts versus Louisiana, only in the fact that the jury is required to answer yes to specific questions. The Louisiana statute was totally rejected as being mandatory, and, of course, our statute requires that in order for a jury to show mercy, if they are of the

opinion that mercy is called for and to the extent they answer question No. 2 yes, they must violate their oath in order to grant mercy in the case.

In other words, if they think mercy is required and they answer both special issues yes, they have no provision in our statute to bring that to the attention of the trial Court. The perplexitive nature of such is that the Supreme Court is not sure what kind of statute we have. The plurality opinion by Justices Stewart, Stevens, and Powell felt that the statute was a discretionary one, whereas the concurring opinion of Justices Burger, Rehnquist, and Justice White felt it was a mandatory statute which shows in and of itself there is some unusual nature to the Texas statute. The unbounded discretion that is referred to in the motion as one of the major factors to set aside the indictment was spoken to initially in the Furman case. It says that the Eighth and Fourteenth Amendments could not tolerate the infliction of the death penalty under a legal system that permitted the death penalty to be so wantonly and freakishly applied. The sentencing body in Texas, the jury must be suitably directed

and limited so as to minimize, at best, the wholly arbitrary and capricious decision.

The Jurek case was decided in relation to four other cases. At the same time, the Supreme Court decided Gregg versus Georgia, Proffitt versus Florida, which were two cases that were affirmed, Jurek and that the two cases that were reversed, Woodson versus North Carolina and Roberts versus Louisiana.

Now, Jurek cites with approval Gregg versus Georgia and Proffitt versus Florida, but the Texas statute cannot be shown to have any relationship to the Georgia statute that was affirmed and the Florida statute that was shown to be constitutionally valid. Under the Georgia law, the judge sumbits to the jury any mitigating factors or aggravating circumstances, along with a list of ten statutorily defined aggravated circumstances. This implies an actual instruction in the charge on these circumstances, mitigating and aggravating. The jury on punishment considers prior criminal convictions, pleas, or the absence of those. Only those aggravating circumstances that are made known to the defendant prior to the trial can be admitted, and the jury can

recommend mercy, regardless of the finding of aggravating circumstances. There is no prediction of future conduct attempted by the Georgia statute, and the Court is, by statute, obligated to submit any lesser included offenses that can be supported by any evidence that is submitted during the trial. By statute, the defendant is granted substantial latitude in the types of evidence he can show regarding mitigation, which is unlike the Texas statute. The jury must specifically find an aggravated circumstance and specifically state in its finding one of the ten aggravating circumstances as defined by statute, and after they have found that, they must specifically say that the death penalty should be assessed, and with those findings the jury makes in writing, it affords the appellate court some method of meaningful review that is not allowed by the Texas statute.

In an effort to assure the death penalty statute is properly applied, the judge -- the trial judge -- is submitted a questionnaire, and in that questionnaire, he must go through every facet of the trial to show the appellete court that there has been no arbitrary or

capricious action on the part of the jury and that there has been no excessiveness or disproportionate treatment to the defendant. The Court must also submit to the appellate court a statement showing that the guilt of the defendant is such that it forecloses all doubt as to his innocence.

The Georgia Supreme Court, in its review of the case on appeal, in its decision, is obligated to make reference to other cases of similar nature, the rulings of those cases as it applies to the case at bar. The reason they must show this is to show that there is no disproportionate treatment throughout the state of Georgia with reference to a particular fact situation. This is also not required under the Texas statute.

The Florida law allows a jury to be waived. It lists eight aggravating circumstances and eight mitigating circumstances submitted to the jury, and the jury can recommend mercy regardless of the aggravating circumstances in Florida. The jury is obligated, under statute, to weigh the aggravating circumstances against the mitigating circumstances, which is not done

in Texas procedure. And then they vote, by the majority, and they submit their findings to the Court. It is advisory in nature, requesting the Court for a pre-sentence investigation, and they can do a number of other things before finding a death penalty is an appropriate sentence. Also, the Florida law does not make any attempt to predict future conduct.

The Texas law -- the special issues the Court is very familiar with -- asks whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; whether there is a probability that the defendant would commit criminal acts of violence that will constitute a continuing threat to society, and where appropriate, the issue of provocation is submitted. It appears that the first two questions, the first question and the third question submitted to the jury, are questions that must be faced prior to getting into the punishment phase, and the fact that they had faced the issue of the intentional killing of a person, and they are faced on Special Issue

No. 1 with finding the act was deliberate, are just asking for confusion within 37.07-1.

Now, the special issues that are required in 37.07-1 are strictly factual determinations, and does not allow the jury to consider mercy with any kind of framework. Now, if the Court determines that the statute under which we are considering here, 37.07-1, the mandatory statute, there is absolutely no guidance not to violate Furman, Gregg, and Woodson, and if the Court finds it is discretionary in nature, then there is no adequate guidance on how to answer special issues in the context of mitigating circumstances. This also would violate Furman and Gregg.

Guidance with respect to 37.07-1 is totally lax in three particulars. Initially, it is lacking with respect to vagueness in 37.07-1. It is lacking in the method by which mitigation and mercy is considered. And it is also lacking in the essence of the way the burden of proof is utilized on the finding of a no answer to one of the jury issues. With respect to vagueness, as the Court is well aware, vagueness is a term that is used to show there is no ascertainable

standard that is presented to a trier of the fact. Terms of the statute, terms such as "deliberately," as I said before, is confusing with respect to their already finding at that point an intentional killing and the 1975 Court of Criminal Appeals case, Blansett versus State, can illustrate this point clearly in that they found no on Special Issue No. 1, and the Court of Criminal Appeals in that instance felt that the fact they found no showed that they wanted some lesser punishment, but that is not within the framework of the statute. The statute does not intimate that the jury can show mercy by answering one special issue, like the first special issue, no.

The term "probability" has caused everyone problems, including the Supreme Court of the United States, because, in essence, it asks a jury to find a probability beyond a reasonable doubt. The term "probability" can mean a number of things. It can mean, in a mathematical sense, can be any chance, however small. Of course, this does not comport with the beyond-a-reasonable-doubt standard, and it also gives such an enormous leeway to differing

definitions of the term that that cannot possibly be what the legislature meant. If the term "probability" means greater than fifty percent, then we are asking the jury to find a probability or a preponderance of the evidence beyond a reasonable doubt, and, of course, the legislature would not have asked them to do that. If probability means a high probability, then you are asking the jury to find what amounts to something beyond a reasonable doubt, and no one, not even the psychiatrists who testify for the State on a regular basis, would testify that future conduct can be predicted beyond a reasonable doubt.

Though raised in Jurek, vagueness was passed over pretty much by the Court. Justice Stevens said it is not easy to predict future behavior, and in illustrating this fact in saying it could be done, however, the Court referred to how the issues of granting bail or granting parole. Of course, as the Court might well recognize, initially granting bail and parole are inconsequential compared to the punishment of the death penalty. And, also, the Court overlooked completely the fact that the

trial judges on a daily basis are confronted with issues of bail, and that is an issue that they are qualified to handle. Parole matters are in the hands of the parole board, and they handle both matters on a daily basis, and they are, supposedly, qualified to handle that. But in the case at bar, or any capital murder case where a jury is making this decision, you are most probably dealing with people who have never been involved in sentencing procedures and are not qualified to answer this question. The Court of Criminal Appeals in Granviel versus State, 552 SW2d., 107, points out the impossibility of defining probability. In that, they define probability as a number of things, including the likelihood, and when you look up the definition of the terms, those terms are used as a definition of probability. None of the suggested definitions require a conclusion -- an issue is more likely to occur than not occur.

The statute fails to state specifically what dangerousness means; what amount of dangerousness is necessary in order to find affirmatively on the special issues. King versus State, 553 SW2d., 105, held the jurors were

supposed to know the meanings of these terms. They were common sense terms, utilized in special issues, and defining instructions are not necessary.

Battie versus State, 551 SW2d., 401, holds in part it is not error to prohibit actually granting the jury the definition as to these terms, but then the statute goes on to other terms, such as criminal acts of violence, continuing threat to society, and I doubt that it would be difficult to state that these terms have no common sense meanings. They are hopelessly vague, and looking at several examples, a slap to the face, would that be criminal? Is the Court asking the jurors to find offenses that are assaultive or more serious assaultive offenses? Does that term apply to damage to property? And what does violent mean? The vagueness of those terms -- the threat to society. What society? Are they talking about the prison society or the civilian society? A person who is granted life in the penitentiary, after finding no on the special issues, would he be most likely to be in prison for quite a while? Under that, is he going to be a threat to the prison society, or

at some later time, is he going to be a threat to civilian society? At what point in time is the jury guided to ascertain what year he might be a threat to society in the future?

Of great importance to the Supreme Court's opinion in Gregg was the Georgia Supreme Court's active role in policing some statutes, and the Georgia Supreme Court held unconstitutional part of their own statute that required a submission to the jury of a substantial history of serious assaultive criminal acts, criminal convictions. Now, this particular statement, substantial history of assaultive criminal acts, is just as vague as the Texas statute, and the only difference between the Georgia statute and the Texas statute is that this was the only part of the Georgia statute that was vague. The Texas statute is entirely vague.

As Professor Dix of the University of Texas law school pointed out in his article on the death penalty statute, Livingston versus State, 542 SW2d., 655, provided an example of criminal acts of violence. There, the transcript reflected that there was evidence that the defendant had been convicted of theft, burglary,

and the case he had just been convicted on, robbery/murder. The jury requested a definition for criminal acts of violence. Now, the Court submitted to them a statement that they should give it the ordinary meaning. The jury returned a short while later with a yes answer, which clearly shows that at the jury had the understanding that criminal acts of violence would include such things as burglary or theft. Ironically, in Jurek, Justice White and Justice Rehnquist stated with plurality opinion, Powell and Stevens, that the Texas statute in its terms had a common sense meaning and a criminal jury should be able to understand it. But the ironic part of that is the plurality opinion never at any time can use that terminology nor is the statement a common sense, core meaning and one that can be understood itself.

It is interesting to note that the jury should be able to understand the meaning of the words rather than the use of more definite terms or mandatory terms such as would or will understand. In other words, the Supreme Court is not totally of the opinion these terms could be understood. The failure of Article 37.07-1

to guide on the issue of mercy is also an issue. As Justice Stevens stated in Jurek, the Texas statute does not explicitly speak to the mitigating circumstances. It directs only that the jury answer three questions -- two questions must be answered, one is one more if it is raised by the evidence. In the Jurek case, the Court stated that question 2 can be interpreted to allow mitigating evidence to come forward, but there's nothing to guide the jury in each individual case, as in the case at bar, on how to handle mitigating circumstances. As an example, the Supreme Court, in a very unusual move, reached down to the case of Smith versus State, which was not before the Court at that time, and showed with approval how mitigating circumstances can come forth in a case. Unfortunately, Smith versus State had no mitigating circumstances, so it was a rather unusual illustration. In that case, it was a filling station robbery that a codefendant did the actual killing, and the Supreme Court relied very heavily, as the Court of Criminal Appeals, on the fact that the defendant did some time on probation for a marijuana conviction, and had --

and had failed to be able to secure adequate employment. Now, if those factors are to be considered under 37.07-1, the statute is immensely vague. These, obviously, were not the type of matters that should be considered by the jury on the issue so great as the death penalty. The reason that the Court found no mitigating circumstances in Smith or any other case that they looked at from Texas is that in 37.07-1, the way the questions are asked are very negative in nature, and the jury is asked under their oaths to follow the law, and there's no framework in the issues to allow mitigating circumstances or mercy. As a mater of fact, in the case of Euniz versus State, 573 SW2d., 792, which cites Burns versus State, it says that circumstances of the offense for which the defendant was found guilty would be sufficient to find affirmatively to question No. 2. In Duffey versus State, 567 SW2d., 197, evidence of non-assaultive matters were found to be probative, but not dispositive as to question 2, but there's no way to know whether non-assaultive cases can be considered by the jury or how to handle the matters when they are confronted with this type of evidence.

There's also no guidance for the trier of fact in weighing the evidence and answering the special issues, such as in Gregg, where the Supreme Court stated an experienced trial judge daily faces the difficult task of imposing sentence and has a vital need of accurate information about the defendant and the crimes that have been committed in order to impose a rational sentence in a typical criminal case. Accurate sentencing information is an indispensable prerequisite to a reasonable determination as to whether a defendant shall live or die by a jury of people who never before have made a sentencing decision. They went on to say that since the members of the jury have little, if any, previous experience in sentencing in their own life, they have to deal with the information they are given. This type of unguided discretion is absolutely essential and was prohibited in Woodson versus North Carolina and Roberts versus Louisiana, and Justice Stewart, who wrote the plurality opinion in Jurek, also wrote in Woodson and insisted on mitigating evidence. This later was upheld in Locket versus Ohio, and the Court of Criminal

Appeals has referred generally to Locket, but there is no guidance in the individual case as to how the jury is to handle mitigation of evidence, in light of specific standards set out by Special Issue No. 2. Actually, the statute contemplates a jury does more than answer the questions asked them. And the Supreme Court has never determined the issue of vagueness and has never addressed the adversary of the standard of determining whether the State has established the requiisite of probability, whatever that term might mean. Mere technical opportunity, or the fact in one case a jury was given mitigating evidence and in some way considered it, the technical opportunity to do so is not constitutionally sufficient.

The focus and range of the jury's inquiry is also too narrow. Juries are merely asked to answer special issues, regardless of the effect. This is referred to in Burns versus State, 556 SW2d., 270. The statute creates sufficient arbitrary application if the jury in some way wants to grant mercy, but they find they would violate their own oath.

If Burns is read to limit any

questioning as to the effect of their deliberations as to the death penalty, with respect to the entire trial process, then that would not allow us to voir dire the jury on this issue, and that would be in violation of Gregg, Woodson, Proffitt, and Roberts.

The Court has allowed questioning of experts in the language of the special issues, but the special issues do not let the attorneys present mitigating circumstances because of the language of the special issues. It does not fit within the framework of those issues, and it is somewhat meaningless to present it. The Texas statute also allows or is so vague in the sense that there is some mitigating evidence that can also be used as aggravating circumstances, such as the issue of intoxication. Intoxication may show mitigation or it might show a particular defendant is more highly susceptible to repeat an offense while intoxicated. It shows in the case of Whitmore versus State, which is docket No. 52-325 of the Court of Criminal Appeals, that the Court requires the Defense to show that intoxication reached the level of temporary insanity before it can be utilized as a

mitigating circumstance. The same type of atmosphere was in Granviel versus State, where prior psychological problems must have been raised in the defense in order to have it used as a mitigating circumstance. This is in violation directly of Locket and Gregg versus Georgia.

The jury is also not instructed how to balance evidence that might mitigate, which also suggests a continuing dangerousness within the vagueness of question No. 2. In Burns versus State, there is an illustration of this paradox by allowing defense counsel to argue against the death penalty and the effect of the jury's answers, despite each juror's oath to the contrary. In Gholson versus State, 542 SW2d., 393, in that case it allowed the prosecutor to argue to the jury to disregard all of the motions and they must answer the question yes if the State proved their case. The jury is not given any authority or guidance where aggravating circumstances are shown, but the jury believes the death penalty should not be assessed. The jury is told by the statute to ignore evidence. The entire legal system of charging, adjudicating

and viewing the death penalty procedure is standardless.

Furthermore, Article 37.07-1 confuses the burden of proof. It seems to imply that the jury can easily get the implication that the Defense must show by some standard, most likely beyond a reasonable doubt, that no should be the appropriate answer to a particular issue. Under those circumstances, it would be violative of Locket and other cases cited before. Additionally, 37.07-1 goes well beyond what we have in a normal case, even a normal murder case, other than a capital case in allowing the State to introduce evidence of non-adjudicated offenses, which might "tend to shed some light to the jury."

Your Honor, for all of these reasons, we would ask the Court to hold 37.07-1 unconstitutional and to quash the indictment brought in this particular case.

THE COURT: Sir, now, you have an additional Motion to Quash, Mr. Dowell. You have the instrument in addition to the ones you have just made argument on entitled Motion to Quash as opposed to Defendant's Motion to Quash, which appears to the Court to go off on a Thompson

issue. Do you care to make argument?

MR. DOWELL: Your Honor, I think the motion speaks for itself. Basically, I would point out to the Court that the indictment itself is so vague --

THE COURT: I said Thompson; I mean Thomas issue.

MR. DOWELL: My prior was corrected to the statute.

THE COURT: Yes, sir. I understand.

MR. DOWELL: This is directed to the instant indictment because it fails to give the defendant fair notice of what he is being charged with. It alleges that the defendant while in the course of committing and attempting to commit the robbery of Mary D. Berry, and then robbery can be committed in several different ways. We are not told how the State intends to prove.

THE COURT: That's what I meant by the Thomas issue. I understand what you are getting at.

MR. DONELL: Fine. I think you will understand, and I will rest on that motion and let it speak for itself.

THE COURT: Anything from the State on any of the three motions?

MR. ROYCE: No, Your Honor.

THE COURT: The Motion to Hold Article 37.07-1 unconstitutional, Defendant's Motion to Quash the indictment and Motion to Quash the indictment are denied.

MR. DOWELL: Your Honor, to which we except and we would respectfully request the judge to mark your ruling in the appropriate place.

THE COURT: All right. I will do so.

MR. DOWELL: Thank you, ma'am.

THE COURT: Yes, sir. But I comment, Mr. Dowell, a very well prepared argument, sir.

MR. DOWELL: Thank you, ma'am.

THE COURT: All right. Mr. Dowell, I have placed my rulings on the motions.

Now then, other motions that are here. We, of course, still have the argument on your Motion to Suppress the confession on the Jackson-Denno. Additionally, there is a Motion to Suppress certain evidence, one which is the statement, and then there is credit cards over items. Do either of you intend to present any

Supreme Court, U.S.
FILED
JUL 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-6405

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PHILLIP D. TOMPKINS,
Petitioner,

v.

TEXAS,
Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 10, 1988
CERTIORARI GRANTED MAY 16, 1988

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Defendant's Requested Instructions and Charges to the Jury (June 1981)	3
Actual Instructions and Charges to the Jury (June 1981)	33
Objections and Exceptions to the Charge of the Court (June 1981)	42
Opinion of the 230th Judicial District Court, Harris County, Texas	47
Opinion of the Texas Court of Criminal Appeals (Oct. 7, 1987)	56
Order denying leave to file motion for rehearing, November 12, 1987	110
Order of the Supreme Court of the United States granting certiorari & leave to proceed in forma pauperis, May 16, 1988	111
Amended Order of the Supreme Court of the United States granting certiorari & leave to proceed in forma pauperis, June 13, 1988	112

RELEVANT DOCKET ENTRIES

Indictment filed February 12, 1981, Harris County, Texas, charging Phillip Daniel Tompkins with capital murder

Defendant's Motion to Quash Indictment, filed March 20, 1981

Motion to Quash Indictment, filed April 22, 1981

Trial commenced June 1, 1981 in the District Court of Harris County, Texas, 230th Judicial District, before Judge Joe Kegans

Jury finds Defendant guilty of capital murder, June 11, 1981

Jury finds punishment for guilt of capital murder to be death, June 15, 1981

Judgment finding Phillip Daniel Tompkins guilty of capital murder and punished by Death rendered at May Term, 1981, p. 181, Volume 11, 230th District Court of Harris County, TX

Defendant's Motion for New Trial filed June 25, 1981

Order of the Court Overruling Defendant's Motion for New Trial, July 14, 1981

Sentence ordering Defendant Phillip Daniel Tompkins, adjudged guilty of capital murder, to be punished by Death, July 14, 1981

Defendant's Appellate brief filed February 9, 1983

State's Appellate brief filed April 4, 1983

Case is remanded for *Batson* hearing on April 20, 1987

Batson hearing held on June 3 & 4, 1987

Findings of Fact & Conclusions of Law as a result of *Batson* hearing issued June 11, 1987

Appellant's Supplemental Brief filed September 24, 1987

Court of Criminal Appeals of Texas decision affirming lower court ruling, October 7, 1987

Appellant's Motion for Leave to File Motion for Rehearing, October 21, 1987

Appellant's Motion for Leave to File Motion for Rehearing Denied, November 12, 1987

Court of Criminal Appeals of Texas on Nov. 19, 1987 entered order staying issuance of mandate until Jan. 21, 1988

Supreme Court of the United States issued order continuing the stay of the mandate pending Court's action on the petition for writ of certiorari on Feb. 3, 1988. Order shall continue, pending issuance of the mandate by the Supreme Court

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
230TH JUDICIAL DISTRICT

No. 329,004

THE STATE OF TEXAS

vs.

PHILLIP DANIEL TOMPKINS

DEFENDANT'S REQUESTED CHARGES

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, PHILLIP DANIEL TOMPKINS, Defendant in the above styled and numbered cause, by and through his attorneys of record, and pursuant to Article 36.15, V.A.C.P., and before the Court has read its charge to the jury, presents this his written instructions and requested charges and asks that they be given to the jury. In order that the jury may be properly instructed and charged in regard to the law, the Defendant requests the following charges:

NO. 1

REQUESTED CHARGE ON THE PRESUMPTION OF INNOCENCE

You are instructed that a person accused of a crime is presumed to be innocent until the prosecution has, by competent evidence, shown Defendant's guilt to the exclusion of and beyond a reasonable doubt. Before this presumption of innocence leaves the Defendant, every material allegation of the Indictment must be proven by the evidence to the exclusion of and beyond a reasonable doubt, and this presumption of innocence accompanies and abides with the Defendant as to each and every material allegation in the Indictment, through each stage of the trial, until it has been so met and overcome by the evidence to the exclusion of and beyond a reasonable doubt.

If any one of the material allegations of the Indictment is not proven to the exclusion of and beyond a reasonable doubt, you must give the Defendant the benefit of such doubt and acquit Defendant. If you find from the evidence beyond and to the exclusion of every reasonable doubt that the Defendant is guilty of the crime charged in the Indictment, then you should find the Defendant, as indicated above, guilty of such offense as you find from the facts, as you will find them from the evidence, may require.

Every Defendant in a criminal case is presumed to be innocent. This presumption of innocence remains with the Defendant throughout the trial unless and until the Defendant is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.

The burden is on the State to prove the Defendant's guilt beyond a reasonable doubt. This burden of proof never shifts throughout the trial. The law does not require a Defendant to prove his or her innocence or to produce any evidence. Unless the State has proven be-

yond a reasonable doubt that the Defendant has committed the offense and every element of the offense and every essential element of the Indictment with which the Defendant is charged, you must find the Defendant not guilty.

GRANTED _____

REFUSED _____

NO. 2

REQUESTED CHARGE ON INTENT

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

GRANTED _____

REFUSED _____

NO. 3

REQUESTED CHARGE ON KNOWLEDGE

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

GRANTED _____

REFUSED _____

NO. 4

REQUESTED CHARGE ON REASONABLE DOUBT

A person accused of crime is presumed to be innocent until his or her guilt has been established by proof beyond a reasonable doubt. To overcome this presumption and establish guilt, it is not sufficient to furnish a mere preponderance of evidence tending to prove guilt, nor to prove a mere probability of guilt, but proof of guilt to the exclusion of, and beyond a reasonable doubt, is indispensible. The burden of such proof is on the State, and it is to the evidence introduced upon the trial, and to it alone, that you are to look for such proof.

Keeping this in mind as jurors charged with the solemn duty in hand, you must carefully, impartially and conscientiously consider, compare and weigh all the testimony and if after doing this you think that your understanding, judgment and reason are well satisfied and convinced by it to the extent of having a full, firm and abiding conviction to a moral certainty that the charge is true, then the charge has been proven to the exclusion of and beyond a reasonable doubt, and it is your duty to convict.

A doubt which is a mere possible doubt or speculative, imaginary or forced doubt, is not a reasonable, but an unreasonable doubt; and for the reason that everything relating to human affairs is open to doubt of this character, such a doubt ought not to control or influence the jury to return a verdict of acquittal where they have an abiding conviction of the truth of the charge as I have stated herein. On the other hand, if, after carefully considering, comparing and weighing all the evidence or lack of evidence, there is not an abiding conviction to a reasonable and moral certainty of the truth of the charge, or if, having a conviction, it is yet one which is not abiding or stable, but wavers and vacillates, or is one which there is not a moral certainty, then the

truth of the charge is not made out beyond a reasonable doubt, and there must be an acquittal because the doubt is reasonable.

A doubt which is not suggested by or does not arise from the testimony, or from the want of testimony, is not a reasonable doubt and should never be considered, or, in other words, if the testimony produces a conviction of the character which I have indicated and stated as being sufficient to prove the charge to the exclusion of a reasonable doubt, the jury has no right to go outside of the testimony for doubts of any kind.

The law presumes a Defendant to be innocent of crime. Thus, a Defendant, although accused, begins the trial with a "clean slate"—with no evidence against the Defendant. The law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. Therefore, the presumption of innocence alone is sufficient to acquit a Defendant, unless the jurors are satisfied beyond a reasonable doubt of the Defendant's guilt from all of the evidence in the case.

A reasonable doubt is a fair doubt, based upon reason and common sense, and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is such as you would be willing to rely and act upon in the most important of your own affairs. A Defendant is never to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a Defendant has the right to rely on failure of the prosecution to establish such proof. A Defendant may also rely upon evidence

brought out on cross-examination or witnesses for the prosecution.

The law never imposes upon a Defendant in a criminal case the burden or duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a Defendant is guilty of the charge.

A reasonable doubt means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a reasonabley prudent person to hesitate to act in the more important affairs of his or her life.

GRANTED _____

REFUSED _____

NO. 5

REQUESTED CHARGE ON WEIGHT TO BE GIVEN TO THE TESTIMONY OF AN IMPEACHED WITNESS

If you believe that any witness has willfully testified falsely with respect to any material fact about which the witness could not reasonably be mistaken, then you may, if you deem it fit to do so, disregard all or any part of the testimony of that witness, or you may accept such portion of his or her testimony as you find worthy of belief.

GRANTED _____

REFUSED _____

NO. 6

REQUESTED CHARGE ON REASONABLE BELIEF

By the term, reasonable belief, as herein used is meant belief that would be held by an ordinary and prudent person who found himself in the same circumstances and in the same situation as the Defendant found himself under the facts in this case as presented to you by the evidence.

GRANTED _____

REFUSED _____

NO. 7

REQUESTED CHARGE THAT
INDICTMENT IS NO EVIDENCE

The Indictment is not evidence of the Defendant's guilt. It is merely the formal manner by which the State accuses a person of a crime in order to bring the accused to trial. The jury must not be prejudiced against the Defendant because an Indictment has been returned against the Defendant.

GRANTED _____

REFUSED _____

NO. 8

REQUESTED CHARGE ON VERDICT

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliveration, do not hesitate to re-examine your own views and change your opinions if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

GRANTED _____

REFUSED _____

NO. 9

REQUESTED CHARGE ON
ELEMENTS OF OFFENSE

In every crime there must exist a union or joint operation of act and specific intent beyond a reasonable doubt.

The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

GRANTED _____

REFUSED _____

NO. 10

REQUESTED CHARGE ON
TWO CONCLUSIONS

If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, the jury should adopt the one of innocence.

GRANTED _____

REFUSED _____

NO. 11

REQUESTED CHARGE ON
BURDEN OF PROOF

The burden of proving a Defendant guilty beyond a reasonable doubt rests upon the State. This burden never shifts throughout the trial. The law does not require a Defendant to prove his or her innocence or to produce any evidence. Defendant may rely upon the evidence brought out on cross-examination of witnesses for the State. If the State fails to prove a Defendant guilty beyond a reasonable doubt, the jury must acquit Defendant.

GRANTED _____

REFUSED _____

NO. 12

REQUESTED CHARGE ON CIRCUMSTANTIAL EVIDENCE

You are instructed that the proof introduced by the prosecution in this case has consisted of circumstantial evidence. Circumstantial evidence is admissible and competent to prove the commission of a crime and may be relied upon to establish guilt. Evidence may be divided into two categories; namely, direct evidence and circumstantial evidence. Circumstantial evidence itself is evidence not bearing directly upon a necessary fact but indirectly through an inference which must be reasonably drawn from that fact. A reasonable inference which may be drawn from a well-connected chain of circumstances is as conclusive of the existence of a fact as is direct testimony to the fact. You are further instructed that the proof of circumstantial facts from which an inference may be drawn must be by direct testimony and that an inference may not be based upon an inference. The proof which the prosecution must show in a case resting on circumstantial evidence is that the inferences drawn from the evidence presented must be consistent with the sole fact sought to be proven and wholly inconsistent with every other reasonable inference. Even when the inference is one of guilt, it must be the only inference which can reasonably be drawn from the facts proven. It is not sufficient that the facts create a strong probability of guilt and be merely consistent with guilt; the facts must be inconsistent with the innocence. You are instructed that unless every inference arising from the circumstantial evidence points with moral certainty to the guilt of the Defendant, not the Defendant's innocence, and not to the guilt of some third party, it is your duty to find the Defendant not guilty.

A conviction on circumstantial evidence cannot be sustained if the circumstances proven do not exclude every other reasonable hypothesis except that of the guilt of

the accused and proof amounting only to a strong suspicion or mere probability, is sufficient.

The mere presence of the accused at the scene of a crime does not, of itself, justify drawing an inference that the Defendant participated therein.

This is a case depending for conviction on circumstantial evidence. In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proven, and the circumstances, taken togehter, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged. But in such cases, it is not sufficient that the circumstances coincide with, account for, and therefore render probable, the guilt of the Defendant. They must exclude, to a moral certainty, every other reasonable hypothesis except the Defendant's guilt, and unless they do so, beyond a reasonable doubt, you will find the Defendant not guilty.

GRANTED _____

REFUSED _____

NO. 13

REQUESTED CHARGE ON EXPERT OPINION

During this trial the jury has heard the testimony of expert witnesses. Such evidence is admissible where the subject matter involved requires special study, training or skill not within the realm of the ordinary experience of mankind and the witness is qualified to give an expert opinion.

However, the fact that an expert opinion is given does not mean that it is binding upon the jury, or that the jury is obligated to accept the expert's opinion as to what the facts are. It is the duty of the jury to determine the credibility and weight that should be given to the expert opinion in the light of all the evidence. Although the jury may not arbitrarily disregard the testimony of an expert witness, if the jury finds that his or her opinion is not based on the facts, or is contrary to the evidence, the jury should disregard it.

GRANTED _____

REFUSED _____

NO. 14

REQUESTED CHARGE ON
CONSIDERATION OF THE EVIDENCE

The Court charges you that if any individual juror is not convinced of the Defendant's guilt to the exclusion of and beyond a reasonable doubt, he or she cannot convict. Each individual juror must be separately so satisfied to support a conviction, and the Court also charges you, and each of you, not to be influenced in your determination of this case by any feeling of bias or prejudice on one hand, or sympathy on the other. This Defendant, as are all Defendants, is entitled to a fair and impartial trial which means that you should calmly deliberate and conscientiously weigh, consider and pass upon the testimony, giving this Defendant the benefit of any reasonable doubt without being influenced in the slightest degree by any outside consideration of any kind of sympathy, bias or prejudice which you may possess.

You are the sole judges of the credibility of the witnesses and of the weight and credit to be given to their testimony. In determining that, you will look to all the facts and circumstances of the case, the witnesses' manner of testifying, their demeanor upon the witness stand, their intelligence, their bias or prejudice, if the same should appear from the trial, their means and opportunity of knowing the things about which they have testified, their interest or lack of interest in the outcome of the case, the probability or improbability of their testimony. If there are any conflicts in the evidence you will reconcile those conflicts, if you can, without imputing perjury to any witness. But if you find conflicts which you cannot reconcile, then take that which you believe to be true and wholly disregard that which you believe to be the product of perjury and let your verdict speak the truth as you find it. If you determine that any portion of the testimony of a witness is the product of per-

jury, then you would be justified in disregarding his or her testimony as a whole, and considering only the legal and competent evidence before you. Further, in weighing and considering the evidence, you should use the same common sense, judgment and reason as you have and use in everyday life.

GRANTED _____

REFUSED _____

NO. 15

REQUESTED CHARGE ON
INADMISSIBLE AND STRICKEN EVIDENCE

Testimony and exhibits to which the Court has sustained an objection, or which the Court has ordered stricken from the record, do not constitute evidence in this case, and must not be considered by the jury.

GRANTED _____

REFUSED _____

NO. 16

REQUESTED CHARGE ON CAPITAL MURDER

Our law provides that a person commits murder when he intentionally or knowingly causes the death of an individual. A person commits capital murder when such person intentionally commits the murder in the course of committing or attempting to commit the offense of robbery.

A person commits a robbery if, in the course of committing theft, as defined hereinafter, and with the intent to obtain or maintain control of the property, he

(a) intentionally, knowingly or recklessly causes bodily injury to another; or

(b) intentionally or knowingly threatens or places another in fear of imminent bodily injury of death.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.

"Attempt" to commit an offense occurs if, with specific intent to commit an offense, a person does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended.

"Bodily injury" means physical pain, illiness, or any impairment of physical condition, including death.

"Theft" as used herein is the unlawful appropriation of the corporeal personal property of another, with the intent to deprive such other person of such property.

"Appropriation" and "appropriate", as those terms are used herein, means to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's effective consent.

"Property" as used herein means tangible or intangible personal property or documents, including money, that represents or embodies anything of value.

"Deprive" means to withhold property from the owner permanently.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by deception or coercion.

"Owner" means a person who has title to the property, possession of the property, or a greater right to possession of the property than the person charged. "Possession" means actual care, custody, control or management of the property.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Before you would be warranted in convicting the defendant of capital murder, you must find from the evidence beyond a reasonable doubt not only that on the occasion in question the defendant was engaged in the commission or attempted commission of the felony offense of robbery, as defined in this charge, but also that during the commission of the robbery or attempted com-

mission thereof, if any, the defendant gagged the victim with the intention of thereby killing her. Unless you find from the evidence beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said Mary Diana Berry when he gagged her, if he did gag her, you cannot convict him of the offense of capital murder.

Now if you find from the evidence beyond a reasonable doubt the the defendant did intentionally kill Mary Diana Berry by gagging her and that said defendant was then and there in the course of committing or attempting to commit the offense of robbery of Mary Diana Berry of her property, then you will find the defendant of capital murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder.

If you find beyond a reasonable doubt that on the occasion in question the defendant did intentionally or knowingly cause the death of Mary Diana Berry by gagging her, but you have a reasonable doubt as to whether the defendant was then and there engaged in the commission or robbery or attempted robbery of Mary Diana Berry at the time of the said gagging, if any, then you will find the defendant guilty of murder, but not capital murder.

If you find from the evidence beyond a reasonable doubt that on the occasion in question the defendant did cause the death of Mary Diana Berry by gagging her, but you have a reasonable doubt as to whether the defendant intentionally killed Mary Diana Berry, as the term "intentionally" has been defined herein, then you will find the defendant guilty of murder but not capital murder, regardless of whether you find from the evidence beyond a reasonable doubt that the defendant was then and there in the course of committing or attempting to commit the offense of robbery of Mary Diana Berry of her property.

If you should find from the evidence beyond a reasonable doubt that the defendant is either guilty of capital murder or murder, but you have a reasonable doubt as to which offense he is guilty, then you should resolve that doubt in defendant's favor, and in such event, you will find the defendant guilty of the lesser offense of murder.

If you have a reasonable doubt as to whether defendant is guilty of any offense defined in this charge, you will find the defendant not guilty.

GRANTED _____

REFUSED _____

NO. 17

REQUESTED CHARGE ON INVOLUNTARY MANSLAUGHTER

Our law provides that a person commits involuntary manslaughter if he recklessly causes the death of an individual.

A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but conciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Before a person can be deemed to be "reckless", there must actually be both a substantial and unjustifiable risk that the circumstances exist or that the result complained of will occur, and that the person acting was actually aware of such risk and consciously disregarded it.

Now if you find from the evidence beyond a reasonable doubt that the defendant did act in such a reckless manner and was the cause of the death of Mary Diana Berry, then you will find the defendant guilty as charged, of involuntary manslaughter.

If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of involuntary manslaughter.

If you find from the evidence beyond a reasonable doubt that the defendant, on the occasion and at the time and place in question did cause the death of Mary Diana Berry, but you have a reasonable doubt as to whether the defendant was aware of a substantial and unjustifiable risk that the circumstances at the time and place existed,

if they did, and that death would occur from his action, or that the defendant, if he was aware thereof, consciously disregarded the said risk, then in such event, you will acquit the defendant of involuntary manslaughter and consider whether he is guilty of criminally negligent homicide.

A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result complained of will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the standpoint of the person charged.

If the jury should find from the evidence or have a reasonable doubt thereof, that there was not a risk of such nature and degree that a failure to perceive it would constitute a gross deviation from the standard of care that an ordinary person would exercise, under all the circumstances, as viewed from defendant's standpoint, then it would be bound to acquit the defendant of criminally negligent homicide.

If you find from the evidence beyond a reasonable doubt that there and then existed, with respect to the circumstances surrounding the defendant's conduct, if any, a substantial and unjustifiable risk that death of a human being would be caused thereby, and that the defendant ought to have been aware of such risk, and that the defendant failed to perceive such risk, and that such risk was then and there of such nature and degree that a failure to perceive it was a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the defendant's standpoint, then you will find the defendant guilty of criminally negligent homicide.

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of criminally negligent homicide.

If you find from the evidence beyond a reasonable doubt that the defendant is guilty of either involuntary manslaughter or criminally negligent homicide, but you have a reasonable doubt as to which offense he is guilty, then you should find the defendant guilty of the lesser offense of criminally negligent homicide.

If you have a reasonable doubt as to whether defendant is guilty of any offense referred to in this charge, you will acquit the defendant and say by your verdict "Not Guilty".

GRANTED ————————

REFUSED ————————

WHEREFORE, PREMISES CONSIDERED, the Defendant, PHILLIP DANIEL TOMPKINS, presents to this Honorable Court the foregoing Requested Charges in writing to the Court before the Charge of the Court is read to the jury, and further prays that the Court grant this Requested Charge, and in the event the Court refuses to grant this Charge, then the refusal of this charge shall be noted thereon.

Respectfully submitted,

/s/ Larry D. Dowell
LARRY D. DOWELL
9225 Katy Freeway, Suite 405
Houston, Texas 77024
(713) 461-2369
State Bar No. 06081000

/s/ Robert Jones
ROBERT JONES

/s/ Robert Clark
ROBERT CLARK
Attorneys for Defendant

[Filed June 10, 1981]

The foregoing Defendant's Requested Charges were presented to the Court in writing after the closing of evidence and before the Charge of the Court was given to the jury, and said Defendant's Requested Charges were filed with the papers of this cause, and the Court, having considered same, hereby overrules each and all of the Defendant's Requested Charges, to which the Defendant duly excepted in open Court.

DATED —— DAY OF ————————, 1981.

———————————

Judge Presiding

IN THE 230TH DISTRICT COURT OF
HARRIS COUNTY, TEXAS
MAY TERM, A.D. 1981

———

(Title Omitted in Printing)

———

CHARGE OF THE COURT AND VERDICT OF THE JURY

Filed: June 11, 1981

———

LADIES AND GENTLEMEN OF THE JURY:

The defendant, Phillip Daniel Tompkins, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 26th day of January, 1981, in Harris County, Texas. The defendant has pleaded not guilty.

1.

Our law provides that a person commits murder when he intentionally causes the death of another.

A person commits capital murder when such person intentionally causes the death of another while such person is in the course of committing or attempting to commit the offense of robbery or of kidnapping.

A person commits a robbery if, in the course of committing theft, as defined hereinafter, and with intent to obtain or maintain control of the property, he

(a) intentionally, knowingly, or recklessly causes bodily injury to another; or

(b) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.

"Attempt" to commit an offense occurs if, with specific intent to commit an offense, a person does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended.

"Bodily injury" means physical pain, illness, or any impairment of physical condition, including death.

"Theft" as used herein is the unlawful appropriation of the corporeal personal property of another, with the intent to deprive such other person of said property.

"Appropriation" and "appropriate", as those terms are used herein, means to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's effective consent.

"Property" as used herein means tangible or intangible personal property or documents, including money, that property represents or embodies anything of value.

"Deprive" means to withhold property from the owner permanently.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by force, threats, or fraud.

"Owner" means a person who has title to the property, possession of the property, or a greater right to possession of the property than the person charged. "Possession" means actual care, custody, control or management of the property.

A person commits the offense of kidnapping if he intionally or knowingly abducts another person.

The term "abduct" means to restrain a person with intent to prevent his liberation by

(a) secreting him or holding him in a place where he is not likely to be found, or

(b) using or threatening to use deadly force.

The term "restrain" means to restrict a person's movements without consent, so as to interfere substantially with his liberty, by moving him from one place to another or by confining him.

Restraint is "without consent" if it is accomplished by force, intimidation, or deception.

"Deadly force" means force that is intended or known by the person acting to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury. Serious bodily injury means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of

his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the standpoint of the person charged.

A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:

1. A different offense was committed; or
2. A different person or property was injured, harmed, or otherwise affected.

Before you would be warranted in convicting the defendant of capital murder, you must find from the evidence beyond a reasonable doubt not only that on the occasion in question the defendant was engaged in the commission or attempted commission of the felony offense of robbery and/or of kidnapping of Mary D. Berry, as defined in this charge, but also that during the commission of the robbery and/or kidnapping or attempted commission thereof, if any, the defendant suffocated Mary D. Berry by placing a cloth gag in her mouth with the intention of thereby killing her. Unless you find from the evidence beyond a reasonable doubt that the defendant, Phillip Daniel Tompkins, on said occasion, specifically intended to kill the said Mary D. Berry when he suffocated Mary D. Berry by placing a cloth

gag in her mouth, if he so did, taking into consideration the foregoing instructions, you cannot convict him of the offense of capital murder.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 26th day of January, 1981, in Harris County, Texas, the defendant, Phillip Daniel Tompkins, did intentionally cause the death of Mary D. Berry by suffocating her by placing a cloth gag in her mouth and that Phillip Daniel Tompkins was then and there in the course of committing or attempting to commit the offense of robbery of Mary D. Berry and/or of kidnapping of Mary D. Berry, then you will find the defendant guilty of capital murder.

If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and consider whether he is guilty of the lesser offense of murder.

If you find from the evidence beyond a reasonable doubt that on or about the 26th day of January, 1981, in Harris County, Texas, the defendant, Phillip Daniel Tompkins, did intentionally cause the death of Mary D. Berry by suffocating her by placing a cloth gag in her mouth, and you have a reasonable doubt as to whether the defendant was then and there engaged in the commission or attempted commission of robbery and/or kidnapping of Mary D. Berry at the time of the suffocating, if any, then you will find the defendant guilty of murder, but not capital murder.

If you find from the evidence beyond a reasonable doubt that the defendant is either guilty of capital murder or murder, but you have a reasonable doubt as to which offense he is guilty of, then you should resolve that doubt in the defendant's favor, and in such event, you will find the defendant guilty of the lesser offense of murder.

If you have a reasonable doubt as to whether the defendant is guilty of any offense, then you should acquit the defendant and say by your verdict not guilty.

This is a case depending for conviction on circumstantial evidence. In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt, all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged. But in such cases it is not sufficient that the circumstances coincide with, account for and therefore render probable the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypotheses except the defendant's guilt, and unless they do so beyond a reasonable doubt, you will find the defendant not guilty.

You are instructed that there are three elements which are essential to establish a common-law marriage:

1. An agreement to become husband and wife;
2. Cohabitation pursuant to that agreement;
3. A holding out of each other to the public as husband and wife.

The burden of proof, as to a common-law marriage, is upon the defendant to prove the common-law marriage by a preponderance of the evidence.

By the term "preponderance of the evidence" is meant the greater weight and degree of the credible evidence in this case.

You are instructed that if you find by a preponderance of the evidence that a common-law marriage exists between Phillip Daniel Tompkins and Lisa Miles, then you shall not consider the testimony of Lisa Miles for any purpose and you will wholly disregard it.

A defendant in a criminal case is not bound by law to testify in his own behalf therein but the failure of any defendant to so testify shall not be taken as a circumstance against him nor shall the same be alluded to nor commented upon by the jury, and you must not refer to, mention, comment upon or discuss the failure of the defendant to testify in this case, and any juror doing so may be guilty of contempt of court. If any juror starts to mention the defendant's failure to testify in this case, then it is the duty of the other jurors to stop him at once.

A grand jury indictment is the means whereby a defendant is brought to trial in a felony case. It is not evidence of guilt nor can it be considered by you in passing upon the question of guilt of the defendant. The burden of proof in all criminal cases rests upon the state throughout the trial, and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him. You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your foreman or forelady. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto, and signing the same as foreman or forelady.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

After you have retired, you may communicate with this court in writing through the officer who has you in charge. Do not attempt to talk to the officer, the attorneys, or the court concerning any question you may have. After you have reached a unanimous verdict, the foreman or forelady will certify thereto by using the appropriate form attached to this charge and signing his or her name as foreman or forelady. After argument of counsel you may retire to consider your verdict.

/s/ Joe Kegans
JOE KEGANS, Judge
230th District Court
Harris County, Texas

VERDICT

We, the Jury, find the defendant, Phillip Daniel Tompkins, guilty of capital murder.

/s/ Denise Hollingsworth
Foreman or Forelady of the Jury

We, the Jury, find the defendant, Phillip Daniel Tompkins, guilty of murder.

_____
Foreman or Forelady of the Jury

We, the Jury, find the defendant, Phillip Daniel Tompkins, not guilty.

_____
Foreman or Forelady of the Jury

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
230TH JUDICIAL DISTRICT

(Title Omitted in Printing)

OBJECTIONS AND EXCEPTIONS TO THE CHARGE OF THE COURT ON THE GUILT-INNOCENCE PHASE OF THE TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW PHILLIP DANIEL TOMPKINS, Defendant in the above styled and numbered cause, by and through his attorneys of record, LARRY DOWELL, ROBERT CLARK and ROBERT JONES, and files this his objections and exceptions pursuant to Article 36.14 V.A.C.C.P. to the charge of the Court, and before the charge is read to the jury, files and presents these his written objections and exceptions to the charge of the Court in writing.

1. Defendant objects and excepts to the charge as a whole, for when construed together or singularly, the charge amounts to an instruction to the jury to return a verdict of guilty in this cause, more specifically, a verdict of guilty of capital murder. The language in the charge is a comment on the weight of the evidence and denies the Defendant due process of law and right to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America, as well as Article 1, Sections 10 and 19 of the Texas Constitution.

2. The Defendant objects and excepts to the Court's failure to charge on the law of involuntary manslaughter, as raised by the evidence in this cause.

3. The Defendant objects and excepts to the Court's failure to charge on the law of criminally negligent homicide, as raised by the evidence in this cause.

4. The Defendant further objects and excepts to the Court's charge because the Court included an instruction on the law of responsibility, specifically Section 6.04 of the Penal Code, because such theory was not plead in the indictment. Defendant further objects to such instruction because the theory of criminal responsibility as set forth in Section 6.04 of the Penal Code was not raised by the evidence.

5. The Defendant further objects and excepts to the charge of the Court in its application of the law of capital murder in this case in that Section 19.03(a) T.P.C. specifically states that a person commits an offense if he commits murder as defined under Section 19.02 (a)(1) of the Penal Code, and Section 19.02(a) T.P.C. states a person commits an offense if he (1) intentionally or knowingly casues the death of an individual. The Court has committed error in attempting to apply the terms and provisions of Section 19.02(a)(2) and (3) T.P.C. to the facts of the case involving the commission of another felony for the reason that the Legislature has specifically ruled that capital murder is only applicable when the person commits an offense if he intentionally or knowingly causes the death of an individual under the terms and provisions of Section 19.02 (a)(1) T.P.C. The Legislature specifically excluded the common law theories of committing an act clearly dangerous to human life while in the act of committing another felony.

6. The Defendant further objects and excepts to the Court's proposed charge in that it submits and instructs

the jury in accordance with Section 6.04(b) of the Penal Code which would allow the jury to find the Defendant guilty of capital murder even though he did not intentionally cause the death of Mary D. Berry.

7. Defendant further objects and excepts to the submission to the jury of a charge on capital murder for the reason that the capital murder statute and its ancillary statutes such as Section 12.31 T.P.C. and 37.071 V.A.C.C.P. as is applied under Texas Law is unconstitutional under both the State and Federal Constitutions due to the fact that it (1) allows for cruel and unusual punishment, (2) allows the jury too much discretion in applying the death penalty to the facts of a particular case or to a particular defendant, (3) allows the Court too much discretion in letting in evidence at the punishment phase of the trial in violation of the equal protection clause of the Fifth Amendment to the Constitution of the United States, and allows for an oath to be taken by the jurors that the possible imposition of the death penalty would not affect their deliberations in violation of *Witherspoon v. Illinois*, the due process clause of the Fifth Amendment and the right to fair trial as guaranteed by the Sixth Amendment and Fourteenth Amendments to the Constitution of the United States of America.

8. The Defendant further objects and excepts to the Court's failure to charge on Defendant's requested charge on the issue of reasonable doubt.

9. The Defendant further objects and excepts to the Court's failure to charge on Defendant's requested charge on the issue of presumption of innocence.

10. The Defendant further objects and excepts to the Court's failure to charge on Defendant's requested charges one through seventeen.

11. The Defendant further objects and excepts to the Court's charge on the common law marriage, because such instruction places the burden of proof on the Defendant. Defendant respectfully submits that the charge should instruct the jury that once the issue of a common law marriage is raised by the defense, then it becomes the State's burden of proof beyond a reasonable doubt to rebut such defensive theory. The charge as it is written places the burden on the defense by a preponderance of the evidence.

12. The Defendant further objects and excepts to the Court's charge because it defines more than one theory of robbery.

13. The Defendant further objects and excepts to the Court's charge because it defines more than one theory of kidnapping.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays and moves that this Honorable Court correct all of the instructions and charges and to give such further instructions as reflected in the Defendant's Objections and Exceptions to the Court's Charge on the guilt-innocence phase of the trial, and to cure the omissions reflected by the said objections and exceptions prior to the Court instruction the jury herein for each and all of the reasons set forth in Defendant's Objections and Exceptions.

Respectfully submitted,

/s/ Larry D. Dowell
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(713) 461-2369
State Bar No. 06081000

/s/ Robert C. Clark
ROBERT CLARK

/s/ Robert A. Jones
ROBERT JONES

[Filed June 11, 1981]

ORDER

The foregoing Objections and Exceptions to the Court's charge are duly presented in writing and filed with the Clerk of the Court prior to the charge being given to the jury and each of said objections were overruled, to which said action of the Court the Defendant duly excepted.

SIGNED, RENDERED AND ENTERED on this the 11th day of June, 1981.

/s/ Joe Kegans
Judge Presiding

(Certificate of Service Omitted in Printing)

IN THE 230TH JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Trial Court #329,004

THE STATE OF TEXAS

vs.

PHILLIP DANIEL TOMPKINS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Order of the Court of Criminal Appeals entered April 20, 1987, a hearing was held in the 230th District Court of Harris County, Texas, on June 3rd and 4th, 1987 regarding possible exclusions made in violation of "BATSON" during jury selection in the Defendant's trial for capital murder. The following findings of fact and conclusions of law are made pursuant thereto:

1. The defendant is an identifiable minority, i.e. black.
2. There were no blacks on the jury that tried the defendant and assessed the death penalty.
3. The complained of State's peremptory challenges were exercised against black venirepersons.

   The foregoing facts constitute a prima facie case under BATSON.

4. The venireperson David Miller was excused by the State by the use of a peremptory challenge.
5. Mr. Miller had originally, on questioning by the Court, disqualified under *Witherspoon*, and was sub-

sequently "rehabilitated" upon questioning by the defense.

6. The State's excusal of Mr. Miller was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

7. The venireperson Belinda Sutphen was excused by the State by the use of a peremptory challenge.

8. Ms. Sutphen had originally, on questioning by the Court, disqualified, under *Witherspoon*, and was subsequently "rehabilitated" upon questioning by the defense.

9. The State's excusal of Ms. Sutphen was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated. Ms. Sutphen also vascilated in her answers to the extent that she was admonished by the Court during voir dire.

10. Venireperson Isabella Thomas was excused by the State by the use of a peremptory challenge.

11. Ms. Thomas at first said she could not follow the law on circumstantial evidence that was in effect at the time of the voir dire and upon which the State relied for a conviction, and though she later indicated she could follow that law if so instructed by the Court, the prosecutor was skeptical about her ability to do so.

12. The State's excusal of Ms. Thomas was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

13. The venireman Frank E. Samuel was excused by the State by the use of a peremptory challenge.

14. Mr. Samuel, though not illiterate, could not satisfactorily fill out juror information sheets and questionnaires, and obviously had extreme difficulty with

legal concepts. The prosecutor felt that he would have great difficulty in understanding the complexities of a capital case. Although less time was spent questioning Mr. Samuel than on some other jurors, it was obvious that that was motivated by what was perceived as Mr. Samuel's inability to understand and comprehend the issues, and not on the fact that he was black.

15. The State's excusal of Mr. Samuel was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

16. The venireperson Leroy Green was excused by the State by the use of a peremptory challenge.

17. Mr. Green testified that over the years he had frequently changed his opinion on the propriety of the death penalty and that his wife was opposed to the death penalty; he frequently made non verbal answers or "yeahs"; there was no valid communication between the prosecutor and the juror. The juror had problems with and vascillated regarding his ability to follow the law of causation and indicated that he might require evidence of premeditation.

18. The State's excusal of Mr. Green was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

/s/ Joe Kegans
JOE KEGANS, Judge
230th District Court
Harris County, Texas

STATE'S EXHIBIT 52

"APPENDIX B"

STATEMENT OF PERSON IN CUSTODY

Date 1-28-81

Time 8:07 PM

Statement of PHILLIP DANIEL TOMPKINS taken in Harris County, Texas.

Prior to making this statement I have been warned by C. W. KENT the person to whom this statement is made, that

1) I have the right to remain silent and not make any statement at all and any statement I make may and probably will be used against me at my trial;

2) Any statement I make may be used as evidence against me in court;

3) I have the right to have a lawyer present to advise me prior to and during any questioning;

4) If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and;

5) I have the right to terminate the interview at any time.

Prior to and during the making of this statement I knowingly, intelligently and voluntarily waive the rights set out above and make the following voluntary statement:

Last Sunday night around midnight I was on S. Main near the ROAD RUNNER INN in PIZZA's mothers car. The car is a 1973 MONTE CARLO with a black top and a maroon bottom. While I was out there, I saw this

white girl drive by in a light colored small car. The girl was driving south on Main and I followed her. I followed her for about fifteen or twenty minutes and she made a couple of turnes. It was foggy and I was smoking a marijuana cigarette and the girl had stopped at a stop sign and I accidently bumped into her from the rear. I was driving real slow when I hit her car. After I hit her, the girl got out and said, "What's the fuck wrong with you?" She was mad because I had bumped into her. I backed up a little bit and put the car in park and got out of the car. She was saying something about calling the cops. I told her that I was sorry and that I didn't mean it. She told me that I should slow down and read the signs. This is when these crazy notions started going through my mine. I saw her holding her purse in her right hand and I was thinking that she might have enough money to get me and PIZZA to Austin. PIZZA is my common law wife, her name is LISA MILES and she is a white girl.

I was thinking about snatching her pocket book but I thought that she would call the cops and I wouldn't get too far so I told her to get into my car. She asked me, "For what?" I told her that I wanted her pocket book and her money. She told me to go ahead and take her pocket book. She told me that she didn't have much money. I told her that I was going to take her with me because I was afraid that she would call the police. At first she said that she wasn't going anywhere. I put my hand on her back and told her to come on. She said, "Don't hurt me". She went on and got into the car with me when I told her that I wasn't going to hurt her. She got into the front seat with me and I drove off. I drove back toward town and over by the ASTRO DOME and down this dirt road, and to this field. There was a house out there and a dog was barking. I took the girl by this tree and tied her up. I just tied her up and I asked her could she breathe. I tied her arms with

a blue sheet and I tied her feet with another piece of the blue sheet. I put a piece of the blue sheet in her mouth and then I tied a checkered shirt around her mouth. I think it was blue, so that she couldn't spit out the sheet.

While we was driving back to town, I was telling the girl about me and PIZZA's problems, our financial problems. The girl asked me if we needed some money. When I told her that I did, she started pulling out all of the credit cards. She said that she didn't have very much money and that all she had was about $20 and some change. I told her that she didn't have to pull all that stuff out of her purse. She asked me how far was I going to take her from her car and I told her that I was going to take her close to the freeway. She asked me if I would leave her a quarter to call her husband and I told her that I would let her have her whole purse. She told me that if I needed some money that she had a QUICK SILVER BANK CARD. She asked me how much I needed and I told her that I needed about $200 or $300. She said that she could give it to me because she knew that she wouldn't get it back. We laughed about what she said and she gave the card. She told me how to use the card. She said, "Push SICK and then $300". I told her that I was going to tie her up then so she couldn't call the police and the police catch me at the bank. This is when I tied her up, I told her that I would be back in a few minutes and untie her.

I left her tied to the tree. I tied her hands to the tree so that she couldn't get away. She was setting up when I left. I can't remember if I had her hands or her legs tied to the tree. I drove to the bank, she had told me that the bank was at FONDRED at BISSONETT. I parked my car (Lisa's mothers MONTE CARLO) about 100′ from the teller. I walked up to the QUICK SILVER teller and put the car in and pushed some buttons like the girl told me to. The machine gave the total. It

showed $3,000. I pushed all of the buttons and I messed up. I read what the sign said, and then I pushed a $1,000 and a bunch of money came out, a $1,000. After I got the money or before I got the money, this janitor at the bank came up to me. He was cleaning up around the area, he was cleaning up with a broom. He was putting trash on top of the camper of this blue and white pick up truck. When he came up to me, he asked me what was wrong. I told him that nothing was wrong, that I was checking to see how much money we had in the bank. He went on sweeping up, he said something but I don't know what. I drove down BISSONETT from the bank towards Stella Link. I got to BELLAIRE at BISSONETT and I saw this cab and I waived him down and told him to take me to the bank. I parked my car in a parking lot near another bank and I got into the cab. There was a white guy driving the cab, it was a yellow cab. The white guy looked about 23 or 22. I told him where to go and he took me back to the bank at FOHDREN at BISSONETT. I got out and tried to use the card again but it didn't work. The machine said to come back tomorrow. I went back and got into the cab and went back and got my car. I asked the cab driver how to get to STELLA LINK. I knew where I was at and how to get there, I was just messing around with him. I got into my car and I drove back to where I had tied the girl up at. When I got there, I parked my car down the road aways because I wanted to walk to where the girl was at just in case the police might be there. I walked up in the bushes and I looked around. I didn't see anybody. I saw the girl and she wasn't moving. I went up to the girl and she was laying down on the ground and she wasn't moving. I checked her pulse and I couldn't feel one. I got scared and I ran to the car and left. I drove to Telephone road and I stopped on Telephone and called the police. The lady that answered said, "Hello Houston Police". I said, "Hello, I ——". I was going to tell her what had happened but

I hung up. This was at around 3:00 or 4:00 in the morning. I hung up and drove to EARL NEWBILL's house on Telephone at his apartment #130. Me and PIZZA have been staying with them for about three days.

When I got to Earls house he wasn't home. Earl was playing cards and I went to find him. I found him at FRENCHIES trailer house playing BLACK JACK. I played cards for a few minutes with them and me and Earl went back to the house.

I just remembered that I had taken the girls watch when I had tied her up and I put it in her pocket book. It should still be in there. It was a silver watch, small with hands.

That night while we were at EARLS house PIZZA saw the purse and she asked me where I had gotten at. I told her that I had snatched it from some lady. I told her that she could have the purse, and she said that she didn't want it. The next day, she was going to go ahead and make me happy and she took the purse. Early MONDAY morning we headed for AUSTIN sometime around 5AM. While we was going down I 10, I had a flat tire and two black guys stopped to help us. They was in a dark blue CHEVY, I believe it was a Chevy. They took me to a service station and I got my spare tire aired up. The two guys told me that they would sell me two tires and they took me somewhere back toward Houston. They took me to his brothers house, the drivers brother.

When we got to the guys house, his brother had a Monte Carlo and I bought the tires off that car. I paid him $25 for the tires. I gave him $5 for helping me. They drove me back to where our car was at on the freeway. I changed the tire on the car and we drove on to AUSTIN.

While I drove to Austin, I cut off I-10 at COLUMBUS and I drove through La Grange. It was Texas 71 (Highway). Before we got to Columbus we had stopped and

spent the night at some Motel. The next day we drove on to Austin and through LaGrange. Somewhere in LaGrange I stopped and threw everything that was in the girls purse in some bushes off the side of the road. I threw everything except the credit cards and the purse away. I think the girls watch is still in the car.

I want to saw that we didn't spent the night at the motel, we stayed there from about 9AM to about 3PM Monday. We got to Austin Monday evening at about 5PM or 6PM. We went to PIZZA's mothers trailer and we stayed there for about two hours and then we checked into a hotel. We checked in at the IMPERIAL 400 HOTEL on S. CONGRESS. This is where we have been staying at.

Today, Wednesday 1-28-81, we drove back to PIZZA's mothers trailer at the KOA CAMP GROUNDS in Austin. This was around about 1PM. We had been there for about two minutes when the cops came there and arrested me and PIZZA. When they handcuffed me, I broke away and run from the police and they caught me. I want to say that PIZZA didn't have nothing to do with what I did. She didn't know about the girl.

I want to say that I have not been promised anything to make this statement. Detective gave me a cup of coffee and I smoked several cigarettes. I have been warned of my rights and I understand them and I want to give this statement. It is the truth to the best of my knowledge.

/s/ Phillip Tompkins
Signature of Person
Making Statement

/s/ [Illegible]
Witness

/s/ [Illegible]
Witness

COURT OF CRIMINAL APPEALS OF TEXAS

No. 68,870

PHILLIP DANIEL TOMPKINS,
Appellant

vs.

THE STATE OF TEXAS,
Appellee

Appeal from Harris County

OPINION

(October 7, 1987)

Phillip Daniel Tompkins, hereinafter appellant, was convicted by a jury of intentionally causing the death of Mary D. Berry while in the course of committing or attempting to commit the offenses of robbery and kidnapping of Berry, which elevated the offense of murder to capital murder. See V.T.C.A., Penal Code, Section 19.03(2). After the jury answered in the affirmative the special issues that were submitted to it pursuant to Art. 37.071, V.A.C.C.P., the trial judge assessed appellant's punishment at death.

We affirm.

Appellant presents to this Court several "Issues for Review" in the two briefs that are in the record of appeal. For purposes of this appeal, we will refer to his "Issues for Review" as "Points of Error."[1] None

[1] Since the promulgation of the new Rules of Appellate Procedure, effective September 1, 1986, contentions in a death penalty case are now referred to as "points of error." See Tex.R.App.Proc. 74(d), 210 (b). Previously, such were labeled "grounds of error." See Tex.R.Crim.Proc. 301; Art. 40.09 (9), V.A.C.C.P.

of appellant's contentions challenge the sufficiency of the evidence on guilt or on any of the issues submitted on punishment. Appellant's points of error, which we group as follows, assert that he is entitled to a new trial because of the following: (1) the prosecuting attorneys selectively exercised their peremptory strikes on several black prospective jurors and fashioned their respective voir dire examination of the remaining black prospective jurors in such a manner so that all blacks would be prevented from serving as jurors in this cause; (2) the trial judge erred by not granting his motion to quash the indictment; (3) the trial judge erred in not finding that a State's witness was, as a matter of law, his common law wife; (3) the trial judge erred in not instructing the jury on the lesser included offenses of involuntary manslaughter and criminally negligent homicide; (4) the trial judge erred in permitting a prison psychologist from the Commonwealth of Virginia to testify against him at the punishment stage of the trial; (5) the trial judge erred in not excluding at the punishment stage of the trial the testimony of two reputation witnesses from the Commonwealth of Virginia who testified for the State; (6) statements made by one of the prosecuting attorneys during her jury argument at the punishment stage of the trial were so egregious that they deprived appellant of a fair and impartial trial; and (7) this Court erred in refusing to grant him permission to file his original appellate brief that numbered 144 pages, which at the time it was submitted for filing exceeded the then existing maximum of 50 pages by 94 pages.

Finding that none of appellant's contentions merit this Court legally reversing his conviction, we will expressly overrule all of them and affirm the trial court's judgment of conviction and sentence of death.

Appellant first asserts that the trial judge erred in overruling his motion to quash the jury that ha. been selected in this cause because the State excluded by peremptory strikes five black venirepersons, thus depriving him of "his right to a trial by a jury of his peers which was truly representative of a cross-section of the community." Appellant relies upon the Constitutions of Texas, the United States, the Texas Code of Criminal Procedure, and case law from this Court and the Supreme Court of the United States as authority for his contention. The record reflects that appellant's motion to quash the jury was presented and overruled prior to the presentation of any evidence but after the jury had been selected to hear this cause.

At the time of appellant's trial, the law on the issue that appellant presents to this Court for review was governed by the Supreme Court decision of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). However, on April 30, 1986, while appellant's case was pending review by this Court, the Supreme Court of the United States in *Batson v. Kentucky*, 476 U.S. ——, 106 S.Ct. 1712, 90 L.Ed.2d 69, 90 L.Ed.2d 69 (1986), overruled *Swain*, supra, "[t]o the extent that anything in Swain v. Alabama, supra, is contrary to the principles we articulate today . . ." 106 S.Ct. at 1725.[2] In *Griffith v. Kentucky* and *Brown v. United*

[2] Although we, of course, cannot expressly state what motivated or caused the Supreme Court to reconsider the requirements it laid down in *Swain*, supra, in order to establish a prima facie case, we observe that many articles criticizing that decision had been previously written. See footnote 14 in *Batson*, supra. Also see Ginger, *Jury Selection in Criminal Trials* (1980 edition); Comment, "The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause," 46 *U.Cin.L.Rev.* 554 (1977); Comment: "A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process," 18 *St. Louis U.L.Rev.* 622 (1974); Comment: "Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury," 52 *Va. L. Rev.*

States, 479 U.S. ——, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the Supreme Court held that *Batson*, supra, applied to litigation pending on direct State or federal review or not yet final when *Batson*, supra, was decided on April 30, 1986, "with no exception for cases in which the new rule constitutes a 'clear break' with the past." However, the Supreme Court held in *Allen v. Hardy*, 476 U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (1986), that *Batson*, supra, was not to be applied retroactively to a case then pending on federal habeas review. Thus, the issue that appellant presents must be decided pursuant to *Batson*, supra, and not *Swain*, supra.

We believe that in order for the reader to fully appreciate what the Supreme Court stated and held in *Batson*, supra, it is necessary to briefly review what the Court stated and held in *Swain*, supra.

1157 (1966); Comment: "Fair Jury Selection Procedures," 75 *Yale L.J.* 322 (1966); Note: "Limiting the Peremptory Challenge: Representation of Groups of Petit Juries," 86 *Yale L.J.* 175 (1976); Note: 79 *Harv. L. Rev.* 135 (1965); Note: "Affirmative Selection: A New Response to Peremptory Challenge Abuse," 38 *Stanford L. Rev.* 781 (1986); "State v. Neil: The Peremptory Challenge Lives On, But For How Long?" 15 *Stetson Law Rev.* 515 (1986); the articles set out in 33 CrL 4068, footnote 1 (June 1, 1983), and the dissenting opinions filed by Justice Marshall, in which Justice Brennan joined, to the refusal of the Court to grant certiorari in *McCray v. New York; Miller v. Illinois*; and *Perry v. Louisiana* (33 CrL 4067-4068 (June 1, 1983). Since *Batson*, supra, was decided, it, too, has caused scholars to analyze and interpret it, and in at least one instance to vigorously assail that decision. See Erickson, Neighbors, and George, *United States Supreme Court Cases and Comments* (1986 edition). However, objective articles have also been written. See "Batson v. Kentucky: The Court's Response to the Problem of Discriminatory Use of Peremptory Challenges," 36 *Case Western Law Review* 581 (1986); Belcuore, "Restricting Racially Motivated Peremptory Challenges", 34 *Federal Bar News & Journal*, January, 1987; Meyer, "Wheeler a Decade Later: The Revolution Continues", *forum*, March/April, 1987; Udasham, "*Batson v. Kentucky*: a Defense Perspective", Summer 1987, *Voice for the Defense*.

In *Swain v. Alabama*, supra, the Supreme Court reaffirmed the principle of law laid down in *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L.Ed.2d 664 (1880), and other cases, see those compiled in 106 S.Ct. at 1716, fn. 3, that a State may not purposefully exclude members of the black race from jury service solely because of their race. In *Strauder*, the State of West Virginia had passed a statute which permitted only white persons to serve as jurors, which the Supreme Court declared was unconstitutional. Although the Supreme Court reaffirmed in *Swain*, supra, the principle that a "State's purposefulness or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause," i.e., that prosecuting attorneys may not exclude members of the same race as the defendant from the jury venire on account of race or on the false assumption that members of the defendant's race as a group are not qualified to serve as jurors, it also held that "the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time . . ." 85 S.Ct. at 839. The Court also held that there was a presumption that the prosecuting attorney did not exercise his peremptory strikes on account of race or on the false assumption that members of the defendant's race as a group are not qualified to serve as jurors.

Based upon what the Supreme court had stated and held in *Swain*, supra, courts throughout the nation, including this Court, see, for example, *Ridley v. State*, 475 S.W.2d 769 (Tex.Cr.App.1972), also see the list of cases cited on page 51 of appellant's original brief, held that merely because no member of the defendant's race had ever served as a juror in a criminal case which the prosecuting attorney had prosecuted was insufficient to establish a prima facie case of purposeful discrimination by that prosecuting attorney, i.e., in the instance where

the defendant was black, to establish a prima facie case of purposeful discretion by the prosecuting attorney, it was necessary for him to establish the repeated striking of blacks over a number of cases by the same prosecuting attorney before a prima facie case was established.

In *Batson*, supra the Supreme Court, after concluding that the quantum of proof made necessary by *Swain*, supra, largely made prosecuting attorneys use of peremptory strikes immune from constitutional scrutiny, then set out a lesser burden of proof through which the defendant could establish a prima facie case of purposeful discrimination by the prosecuting attorney:

> To establish such a case, [that the prosecuting attorney had exercised his peremptory challenges on the basis of purposeful discrimination], the defendant first must show that he is a member of a cognizable racial group . . ., and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race . . . [T]hese facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors raises the necessary inference of purposefulness discrimination. 106 S.Ct. at 1723.

If a prima facie case is established by the defendant, the prosecuting attorney's exercise of his peremptories to strike black persons would violate principles of equal protection of the law, unless he could come forward and demonstrate some "neutral"- non-race related- explanation, relating to the case to be tried, for excluding the prospective jurors. *Batson*, supra, held that to be acceptable the explanation need not, however, be equal to "cause" sufficient to justify a challenge to a juror for cause.[3] Thus, under *Batson*, supra, it is only when the

[3] *Batson*, supra, does not concern the State challenging pospective black venirepersons for cause.

defendant makes a prima facie showing that the burden then, and only then, shifts to the State to come forward with a neutral explanation why peremptory strikes were exercised on the black jurors who were struck. 106 S.Ct. at 1723.

As previously pointed out, while appellant's case was under submission and pending review by this Court, the Supreme Court decided *Batson v. Kentucky*, supra. In light of *Batson's* evident impact upon appellant's above contention, on April 22, 1987, this Court in an unpublished opinion ordered the appeal abated to the trial court with instructions to the trial judge to conduct an evidentiary hearing and determine whether appellant had made a prima facie showing of purposeful discrimination and, if so, whether the prosecuting attorneys in this cause could offer a racially neutral explanation for using their peremptory strikes which is what we also did in *Henry v. State*, —— S.W.2d —— (Tex.Cr.App. No. 1216-85, April 8, 1987); *Keeton v. State*, —— S.W.2d —— (Tex. Cr.App. No. 69,639, April 15, 1987); and *Williams v. State*, —— S.W.2d —— (Tex.Cr.App.No. 69,147, May 20, 1987).[4] The trial court has conducted the hearing, and the appellate record is now supplemented with a statement of facts of the hearing and written findings of fact and conclusions of law from the trial judge, a copy of which is attached to this opinion as "Appendix A". The trial judge found that appellant established a prima facie case "under Batson", and also found, implicitly, that the prosecuting attorneys did not exercise their peremptories against the five black venirepersons complained about solely on account of their race or on the assumption that black jurors as a group would be unable impartially to consider the State's case against appellant, who the record reflects is a member of the same race, and expressly found that the prosecuting attorneys gave neutral

[4] Also see *De Blanc v. State*, —— S.W.2d ——, (Tex.Cr.App. No. 69,580, July 1, 1987).

nonracial explanations for exercising peremptory challenges against the five black venirepersons, about which appellant complains.

Neither party challenges the trial court's finding that a prima facie case of purposeful discrimination was established by appellant, and we find that the record supports such a finding. Therefore, we have no occasion to consider whether appellant did, in fact, establish a prima facie showing of purposeful discrimination. Rather, we now turn to a review of the trial court's determination that the prosecuting attorneys did not use peremptory strikes for the purpose of excluding from jury service members of appellant's race.

The relative burdens of proof appropriate to the inquiry are given by *Batson*, supra, which we here excerpt and arrange in logical sequence:

> Once a defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors . . . related to the particular case to be tried. [106 S.Ct. at 1723].
>
> * * * *
>
> If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. [106 S.Ct. at 1725].
>
> * * * *
>
> [If the prosecutor does come forward with such an explanation] [t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination. [106 S.Ct. at 1723-1724].
>
> * * * *

> Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. [106 S.Ct. at 1724, n. 21].

A prima facie case represents the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true. The party with the burden of proof must produce at least this much evidence to avoid a finding that the allegation is not true as a matter of law. Once produced, however, the allegation must be found true unless it is contradicted, impeached, or rebutted by other evidence. In the present context, such other evidence must include a racially neutral explanation by the prosecuting attorneys, and must be legally adequate to support a judgment in favor of the state. If it is, an issue of fact is joined which can only be resolved by an assessment of evidentiary weight and credibility. It is the burden of the accused to persuade the trial judge by a preponderance of the evidence that the allegations of purposeful discrimination are true in fact.[5]

Here, we are on much more familiar ground, for it is the sufficiency of evidence to support the proposition that

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[5] Support for the foregoing paragraph may be found in the following note from *Batson*, supra, 106 S.Ct. at 1721, n. 18, and the cases cited therein:

> "[D]ecisions in the context of Title VII [of the Civil Rights Act of 1964] 'disparate treatment' have explained the operation of prima facie burden of proof rules. See Mc Donnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. Texas Department of Community Affairs v. Burdien, supra, 450 U.S. at 251-256, 101 S.Ct. at 1093-95."

we evaluate against a settled standard. Thus, where the accused has the ultimate burden to prove a factual allegation, such as purposeful discrimination in jury selection, by a preponderance of evidence, an appellate court must view the entire record in a manner favorable to the factfinder's determination and reverse only if no rational trier of fact could have failed to find his factual allegation true by a preponderance of evidence. See *Van Guilder v. State*, 709 S.W.2d 178 (Tex.Cr.App.1985), cert. denied, —— U.S. ——, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986); *Schuessler v. State*, 719 S.W.2d 320 (Tex. Cr.App.1986).

A trial judge, in determining whether a prospective juror has been challenged by the prosecution on a racial basis in violation of the United States Constitution, see *Batson*, supra, has an obligation to weigh the evidence and assess the credibility of witnesses.[6] In short, the trial judge is a factfinder. If from the evidence he believes that the prosecutor exercised peremptory strikes to exclude venirepersons based upon racial considerations, it is his duty to so find and to provide appropriate relief. This Court and the courts of appeals are principally reviewing courts. We do not substitute our judgments of witnesses' credibility and evidentiary weight for those of the factfinder, but affirm those judgments whenever the record discloses sufficient evidence in their support.

At the "Batson" hearing that this Court ordered, see *ante*, though certainly afforded the opportunity to do

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[6] Obviously, the prosecutor's testimony cannot alone be dispositive of the question. If he admits a racially motivated reason for exclusion, without more, the trial judge should never find otherwise. But if he denies any racial motive, the trial judge as factfinder must necessarily gauge the credibility of his testimony, determined in part, at least, by the plausability of his explanation. This task is no different in principle than any other factfinding enterprise.

so, appellant did not attempt to compare the five complained about black venirepersons with any of those venirepersons who were not challenged by the prosecution.[6A]

Appellant, however, did establish that black jurors have been relatively uncommon on capital murder juries in Harris County during the past several years, but did not elicit any evidence that the Office of the District Attorney of Harris County, which appears contrary to the policy that the Office of the District Attorney of Dallas County once had, see *Batson v. Kentucky*, supra,

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[6A] In a supplemental brief, filed on September 28, 1987, appellant has offered just such a comparison, inviting this Court to employ the record of jury selection that exists in this cause to impeach or rebut testimony given by the prosecutors at the "*Batson*" hearing, supra. The point is well-taken and does cast considerable doubt upon the neutral explanations offered by counsel for the State. Had the matter been pressed by defense counsel during his cross-examination of the prosecutors, or otherwise brought before the trial judge at the "*Batson*" hearing, it might have materially affected the trial judge's ultimate findings of fact.

However, even though the trial judge might have judicially noticed or independently recalled testimony from the jury selection process, there is nothing in the "*Batson*" hearing to suggest that she was requested by defense counsel to do so. In short, at the "*Batson*" hearing counsel for appellant gave no indication to the trial judge that he wanted her to consider the credibility of any neutral explanation offered by the State based upon the manner in which similarly-situated white veniremen were treated during *voir dire*.

We point out that, at a hearing conducted pursuant to *Batson*, the trial judge is the factfinder, and it is his responsibility to weigh the evidence and determine the credibility of the witnesses. A reviewing court should reverse his findings only when they are not supported by sufficient evidence or, as we often say, for an "abuse of discretion." Because the trial judge was not urged to make, and did not make, a finding based upon a comparison analysis in deciding the issue whether the prosecutors' neutral explanations were rebutted or impeached at the "Batson" hearing with evidence that unchallenged white veniremen also possessed the same purportedly undesireable characteristics, we do not consider this circumstance in reviewing the trial judge's findings in this cause.

Marshall, J., concurring opinion, 90 L.Ed.2d at 92, to exclude, through peremptory strikes, "Jews, Negroes, Dagos, Mexicans or a member of any minority race" from serving on a jury.

As to the five black prospective venirepersons who were peremptorily struck by the prosecuting attorneys, we agree with the trial judge that the prosecuting attorneys articulated at the hearing racially neutral explanations, which were both plausible and unambiguous, for exercising their peremptories on the five complained about black venirepersons.

The prosecuting attorneys' testimony reflects that two of the five black venirepersons were struck because of their general opposition to the death penalty, although such beliefs would not have prevented or substantially impaired them from performing the office of juror. One of the two venirepersons also indicated that she might refuse to return a verdict unless appellant testified at trial. Thus, as to two of the five, there was an independent, non-racial basis for the prosecuting attorneys' decision to strike these two black venirepersons.

The prosecuting attorneys' testimony reflects that a third black venireperson, who in the course of her employment had been twice robbed at gunpoint, was excluded, by the prosecuting attorney's statement at the "Batson hearing", because she indicated serious reservations about returning a verdict of guilty based on circumstantial evidence alone.

Contrary to the complete memory of the attorneys for the respective parties who participated in the trial and at the "Batson hearing", and apparently the trial judge herself, the record reflects that when the trial judge ruled, after the pretrial hearing on appellant's motion to suppress appellant's confession had been held, as follows: "Your motion is denied as to the written confession. It is sustained as to the oral confession, to wit,

the tape recordings that we heard the testimony in that regard." See Vol. VI of XXIV, page 67, of the record. The record also reflects that thereafter, during the trial, the trial judge, after a Justice of the Peace from Travis County, who had testified at the pretrial hearing on appellant's motion to suppress, had testified in part, *sua sponte* excused the jury and then stated the following: "All right. Gentlemen, in view of Judge Herman's testimony and in view of the Supreme Court's decision in Edwards versus Arizona returned on May 18, 1981, which is *approximately a month after we had a Jackson-Denno hearing in this case*, I will reverse my prior ruling regarding your Jackson-Denno hearing and the Motion to Suppress the written confession of the defendant is granted." (Our emphasis.) See Vol. XXII of XXIX, stamped pages 767-768, printed pages 56-57, of the record.

Thus, when the prosecuting attorney conducted his voir dire examination of the above venireperson, he had appellant's written confession, which had been ruled by the trial judge to be admissible evidence, ready to be offered into evidence. This was certainly direct evidence, although it might be arguable as to how direct it was to all that needed to be proved in order to establish beyond a reasonable doubt appellant's guilt of capital murder. Nevertheless, we find his statement that he gave at the "Batson hearing", in response to the question, "Q: Why was the law of circumstantial evidence so important at that particular time?", "A: That was my whole case. We had no direct evidence. . . .", a little shocking and totally not understandable. Without more, we find that we would have to hold that only an irrational trier of fact could have accepted this reason as a "neutral explanation" why he used a peremptory strike on the juror.

There is more, however. The voir dire examination of the above venireperson reflects that she was first questioned by the trial judge. One of the prosecuting attorneys, who testified at the "Batson hearing", then questioned the venireperson. He first covered with her such legal terms as "burden of proof" and "reasonable doubt", and then explained to her the elements of the offense of capital murder and murder, and the difference in punishment for capital murder and murder. The venireperson stated that if she found a defendant guilty of murder she could consider the entire range of punishment for that offense. He then explained to her the elements of the alleged underlying felony offenses and intent. He then covered with her the law of parties and motive. During the questioning, the venireperson stated that "All I want to know if he was there at the time or if he actually did it." The prosecutor then covered the legal term "presumption of innocence" and the right of the accused not to testify. He then covered the punishment

stage where the defendant has been found guilty of capital murder, and the special issues that the jury would answer. The prosecutor also asked the venireperson what the term "deliberately" meant to her, and ascertained that she would not automatically answer the special issues in the affirmative simply because she had found the defendant guilty of capital murder, and would answer them based upon the evidence presented. The prosecuting attorney then questioned the venireperson about her understanding of direct versus circumstantial evidence. When asked, whether "in the proper case can you apply the law of circumstantial evidence in a capital murder case?", "Can you find someone guilty of capital murder based on what we call—you know, we have got to put a label on everything—not direct evidence, but circumstantial evidence?", the venireperson responded: "I don't think so." The trial judge then questioned the venireperson, using the example "Nobody saw him get into the cookie jar" to describe the meaning of the legal term "circumstantial evidence". Finally, the venireperson stated that she could not apply the law of circum-

stantial evidence to a capital murder case. However, she also stated that she could find someone guilty based on circumstantial evidence, "if I was shown all of the possibilities of beyond a reasonable doubt. I could." Thereafter, the prosecuting attorney questioned the venireperson concerning believing a police officer over a lay person, her employment and whether jury service would cast an undue burden on her. The defense did not question the venireperson about circumstantial evidence, or direct evidence for that matter. The prosecutor thereafter used a peremptory strike on the venireperson.

Although when the prosecutor voir dired the venireperson, because he then had appellant's written confession which had been ruled admissible evidence, his case was not entirely dependent upon circumstantial evidence, if at all. As things turned out, his case ultimately turned on circumstantial evidence. In fact, the trial judge instructed the jury on the law of circumstantial evidence.

Therefore, because appellant's written confession, which we attach to this opinion as "Appendix B", did not completely rule out an instruction by the trial judge on the law of circumstantial evidence, we hold that the prosecuting attorney exercised a peremptory on the venireperson rather than risk a hung jury.

The prosecuting attorney exercised a peremptory strike on the fourth black venireperson because, according to the prosecuting attorney who testified on this point, that person's reading and writing skills were poor. Since the case was complex and was expected to include detailed written jury instructions, the State evidently preferred to avoid literacy problems on the jury and used a peremptory strike on that person.

The fifth black venireperson gives us great concern because the testimony reflects that that person was peremptorily struck solely, by the testimony of the prosecuting attorney who testified on this point, because he

had been an employee of the United States Postal Service for some thirteen years, and not "simply because he was black."

The record reflects that that venireperson expressed a certain difficulty understanding the law of causation in criminal cases, as well as the notions of "probability" and "continuing threat to society" concerning the punishment issues, which understanding we find was essential in order for the juror to decide whether appellant was guilty of capital murder and, if so, whether there was a probability that appellant would thereafter commit criminal acts of violence that would constitute a continuing threat to society. However, our reading of the entire jury selection process in this case discloses widespread disagreement and uncertainty among the venirepersons, as it does in nearly every capital murder case, regarding legal definitions and concepts, which are usually alien to most venirepersons. Not surprisingly, it is not uncommon for those venirepersons to appear inarticulate, confused, and tentative under these conditions. We find that this prospective black venireperson's answers to questions asked did not indicate an inability on his part, that was any greater or less than the unchallenged venirepersons, to understand the law or to apply it impartially. This venireperson also did not indicate a bias or prejudice against any phase of the law pertinent to this case. Indeed, the State did not urge at the hearing any such basis upon which to doubt the venireperson's qualifications for jury service. As noted, the sole reason given why the venireperson was struck was that he was an employee of the United States Postal Service.

We have some difficulty understanding the relevancy of a venireperson's employment as a postman employed by the United States Government as far as his qualifications for jury service. Although the prosecuting attorney indicated that "I have not had very good luck with

postal employees", she did not elaborate upon her evident bias against such employees. Perhaps, indeed, federal postal employees share a common view of the criminal justice system antithetical to the interests of law enforcement. But if so, we are not aware of it, nor has the State undertaken to enlighten us further on the subject.

Notwithstanding what we have stated, we found that the prosecuting attorney's reasons that she gave constitute a racially neutral explanation, and it is not the office of this Court to judge her credibility. Explicit in *Batson*, supra, is that a prosecuting attorney is free to exercise his peremptory strikes, provided that they are non-race related. "The challenge, after all, is still a peremptory one." See Belcuore, supra.

Therefore, we conclude, with respect to the five complained about black venirepersons, that a rational trier of fact might have failed to find, by a preponderance of the evidence, an intentional discrimination on the part of the prosecuting attorneys in this cause. By so holding, we remind trial judges who are confronted with the issue that in their capacities as factfinders the truth of a racially neutral explanation should be judged in part by its plausibility. A trial judge may not abdicate his responsibility to decide whether a peremptory challenge was racially motivated, nor may he leave such questions to an appellate resolution. He is the factfinder in such matters, and must find the facts fairly and judiciously, according to the burdens of proof prescribed by law.

We have carefully scrutinized the prosecuting attorneys' offered reasons why they used five of their peremptory strikes on the above five black venirepersons in light of the hearing that was conducted by the trial judge and find and conclude that the trial judge believed the race-neutral explanation given by them. Whether this Court would have made the same judgment as the trial judge did is unimportant, because her conclusion,

given a subjective belief in the truth of the prosecuting attorneys' explanations, which is supported by sufficient evidence, comports with that of a rational trier of fact.

Appellant's first contention is overruled. Also see *People v. Turner*, 726 P.2d 102, (Calif. 1986); *Branch v. State*, —— S2d —— (Ala.Ct.Crim.App. 11/12/'86); *Wallace v. State*, —— S2d —— (Ala.Ct.Crim.App., No. 1 Div. 360, 3/10/'87; *United States v. Woods*, 812 F2d 1483 (4th Circ. 3/5/'87); *State v. Butler*, 731 S.W.2d 265 (Mo.Ct.App., W.Dist. 4/7/'87), *State v. Jones*, S. Carolina #22751, 7/30/87. Also see footnote 2, *ante*.

Appellant next contends that his conviction should be reversed because "The trial court erred in overruling his motion to quash the indictment for the reason that it fails to set forth clearly and unequivocally the offense for which he was charged in plain and intelligible words insomuch that Appellant was precluded from knowing the exact nature of the offense for which he was charged." We disagree.

The indictment in this cause, in unnumbered count one, charged that appellant, "while in the course of committing and attempting to commit the Robbery of MARY D. BERRY, hereafter styled the Complainant, intentionally cause[d] the death of the Complainant by suffocating the Complainant by placing a cloth gag in her mouth", and, in unnumbered count two, charged that appellant, "while in the course of committing and attempting to commit the kidnapping of MARY D. BERRY, hereafter styled the Complainant, intentionally cause[d] the death of the Complainant by suffocating the Complainant by placing a cloth gag in her mouth." Both counts were submitted to the jury. The jury's verdict simply reads: "WE, THE JURY, FIND THE DEFENDANT, PHILLIP DANIEL TOMPKINS, GUILTY OF CAPITAL MURDER." "Sec. Art. 37.07, Sec. 1(a), V.A.C.C.P.

We understand appellant's argument to be that the indictment was subject to his motion to quash because it failed to give him notice of the constituent elements of the offenses of robbery and kidnapping, attempted kidnapping, and attempted robbery, which were the underlying offenses alleged in this cause to elevate the offense of murder to capital murder. See V.T.C.A., Penal Code, Section 19.03. We find no authority supporting appellant's contention. The capital murder statute, Section 19.03, supra, does not require the pleader to define with particularity in the indictment the constituent elements of the underlying felony offenses that were alleged in the indictment in this cause.

Just recently, in *Landry v. State*, 706 S.W.2d 105 (Tex.Cr.App.1985), this Court rejected a like contention, simply stating the following: "[T]his Court has in the past upheld capital murder indictments identical to the instant indictment in the face of a motion to quash. See *Hammett v. State*, 578 S.W.2d 699 (Tex.Cr.App. 1979), *Burns v. State*, 556 S.W.2d 270 (Tex.Cr.App. 1977); *Smith v. State*, 540 S.W.2d 693 (Tex.Cr.App. 1976), and *Demouchette v. State*, 591 S.W.2d 488 (Tex. Cr.App.1979). These cases all stand for the proposition that it is unnecessary to allege the elements of the underlying felony in a capital murder indictment . . ." (107-108).

Hammett, supra, cited *Smith*, supra, *Burns*, supra, *Gonzalez v. State*, 517 S.W.2d 785 (Tex.Cr.App.1975), *Watts v. State*, 516 S.W.2d 414 (Tex.Cr.App.1974), and *Livingston v. State*, 542 S.W.2d 655 (Tex.Cr.App.1976), as its authority, all of which made a like conclusory holding. *Smith*, supra, merely held: "Appellant's contention [that the indictment was fatally defective because it failed to set out the elements of robbery where the charge was murder committed in the course of committing a robbery] was answered adversely to him in *Jones v. State*, 53 Tex.Cr.R. 131, 110 S.W. 741, and

Oates v. State, 48 Tex.Cr.R. 131, 86 S.W. 769, which hold that an indictment need not allege the constituent elements of a felony which the defendant was committing or attempting to commit at the time of the homicide charged in the indictment.", i.e., an indictment charging one offense during the commission of another crime need not allege the elements of the latter offense. Also see *Brasfield v. State*, 600 S.W.2d 288 (Tex.Cr.App. 1980); *White v. State*, 543 S.W.2d 104 (Tex.Cr.App. 1976); *Earl v. State*, 514 S.W.2d 273 (Tex.Cr.App. 1974). Appellant's contention is overruled.

In overruling appellant's contention, we are not unmindful of what this Court stated and held in *King v. State*, 594 S.W.2d 425 (Tex.Cr.App.1980). There, this Court held that a capital murder indictment, which did not allege who the victim of the underlying offense was, contrary to here, was subject to the defendant's motion to quash. This Court held: "It is clear that *when criminal conduct*, constituting an aggravated feature of an offense *may be directed at a person other than the ultimate victim of the crime alleged*, the specification of that person is a fact to which the accused is entitled should he request it by timely filed written motion to quash. (Citations omitted.)" (426) (Our emphasis.) In reaching this holding, this Court distinguished several of the above mentioned cases where relief had not been granted and pointed out that "the name of the person at whom the aggravating conduct is directed is not an essential element in such a context, but rather, a fact which is crucial to the accused's preparation of his defense to the main charge of capital murder," (426-427), i.e., when criminal conduct constituting an aggravating feature of an offense may be directed at a person other than the ultimate victim of the crime alleged, the specification of that person is a fact to which the accused is entitled should he request it by timely filed written motion to quash. The requirements of *King*, supra, were satisfied

in this case because the indictment here alleged that Berry was both the victim of the murder and the victim of the robbery and kidnapping. E.g., *Pinkerton v. State*, 660 S.W.2d 58, 63 (Tex.Cr.App.1983). Cf. *Beck v. State*, 682 S.W.2d 550 (Tex.Cr.App.1985).

We find and hold that the indictment in this cause did not fail to convey some requisite item of notice to appellant. Cf. *Adams v. State*, 707 S.W.2d 900 (Tex.Cr. App.1986), in which a majority of this Court expressly overruled this Court's decision of *Jeffers v. State*, 646 S.W.2d 185 (Tex.Cr.App.1983), which had expressly overruled *Craven v. State*, 613 S.W.2d 488 (Tex.Cr.App. 1981). Also see *Drumm v. State*, 560 S.W.2d 944 (Tex. Cr.App.1977).

Appellant's contention that the trial judge should have sustained his motion to quash the indictment, for the reasons he gave, is overruled.

Appellant next asserts that his conviction should be reversed because "The trial court erred in permitting the prosecution to call during the guilt/innocence phase of trial the Appellant's wife as a witness for the State in the presence of the jury." As authority, appellant relies upon, inter alia, the provisions of Art. 38.11, V.A.C.C.P., the "husband-wife privilege" statute that prohibits either spouse, except in certain enumerated instances not applicable here, from testifying against the other spouse. For an up-to-date discussion of the privilege, which may no longer exist because of Rule 504, Tex.Rules of Crim. Evid., effective September 1, 1986, see *Willard v. State*, 719 S.W.2d 595 (Tex.Cr.App.1986). Because appellant's trial occurred prior to September 1, 1986, the provisions of Art. 38.11, supra, are applicable to this cause.

On the issue of whether or not a common law marriage existed, the trial judge in this cause first instructed the jury in the abstract on the elements of a common law marriage: "1. An agreement to become husband and

wife; 2. Cohabitation pursuant to that agreement; and (3) A holding out of each other to the public as husband and wife pursuant to the agreement," and then instructed the jury that "if it [found] by a preponderance of the evidence that a common-law marriage exist[ed] between Phillip Daniel Tompkins [appellant] and Lisa Miles, then [it would] not consider the testimony of Lisa Miles for any purpose and [would] wholly disregard [her testimony]." The jury was not asked to make, nor did it make, a specific finding on the issue.

The record reflects that the trial judge conducted a hearing out of the jury's presence on the appellant's motion to prohibit Miles from testifying for the State and against him, after which she, the trial judge, overruled the motion and permitted Miles to testify for the State.

Although the record reflects that Miles was originally arrested with appellant for committing the capital murder of the deceased, the record does not reflect or indicate that she was ever formally charged with committing or participating in the commission of the murder of the deceased. The record does reflect that after she was arrested she was released, but does not reflect the circumstances that governed her release. We have yet to find in the record a request by appellant that the jury could find that Miles, either as a matter of fact or law, was an accomplice witness. However, our review of the record reflects that such a request would have been without merit.

The record of the hearing held outside the presence of the jury to determine whether Miles and appellant were common law husband and wife reflects the following: Miles testified that she had known appellant "Since about August or September of 1980", commenced living with him on December 1, 1980, and continued to live with him until they were both arrested in Austin on January 26, 1981. Miles testified that although she and appellant were not married "in the eyes of the law," because a

ceremonial marriage had not yet been performed, she nevertheless considered herself then married to appellant. She further testified that she and appellant intended in the future to go through a ceremonial marriage. Miles admitted in her testimony that she never told anyone, including her mother, that she and appellant were married, because "the question never came up"; admitted that she never filed with any County Clerk a declaration of informal marriage, see Section 1.92, *Family Code*; and admitted that she never went "by the name of Lisa Tompkins." The testimony also established that when appellant and Miles decided to live together they rented an apartment together but signed their respective names to the apartment lease. There is also testimony that Miles had a young child; however, the record does not reflect any specifics regarding the child, such as who the natural father of the child might have been and what relationship, if any, Miles and that person might have had. The subject of Miles' prior marital history, if any, was not broached by the parties.

The issue before us is not whether there was sufficient evidence before the jury to warrant the trial judge submitting the issue, whether as a matter of fact there was a common law marriage between appellant and Miles, to the jury because, by her instruction to the jury, the trial judge found that there was sufficient evidence to raise the issue of a common law marriage and so instructed the jury for it to resolve. The issue that we must resolve is whether appellant established as a matter of law at the hearing held outside of the jury's presence that he and Miles were married common law. In *Bodde v. State*, 568 S.W.2d 344, 352 (Tex.Cr.App.1978), this Court pointed out the following: "Although the better view is that such issues should be decided by the trial judge . . . prior decisions of this Court dictate that this issue, when raised by the evidence, be submitted to the jury . . ." This Court has long held that it will closely

scrutinize a claim of common law marriage, and requires that the agreement to become husband and wife should be established by a preponderance of the evidence showing that the agreement was to be specific on both sides. See *Hightower v. State*, 629 S.W.2d 920 (Tex.Cr. App.1981); *Bodde v. State*, supra; *Chatman v. State*, 513 S.W.2d 854 (Tex.Cr.App.1974); *Welch v. State*, 151 Tex. Cr.R. 356, 207 S.W.2d 627 (Tex.Cr.App.1948). In *Welch*, supra, this Court emphasized the following: "Marriage is more than a contract, it is a status in which stability and permanence are vital, and this is particularly true when dealing with common-law marriages."

The elements of a common law marriage, as the jury was instructed in this cause, are the following: (1) that the parties enter into an agreement, express or implied, to become husband and wife; (2) that they thereafter cohabit pursuant to that agreement; and (3) a holding-out of each other to the general public that they are husband and wife. However, in order to establish a common law marriage as a matter of law, it is not necessary to establish each element by direct proof, as each element may be established by circumstantial, as well as direct, evidence. Marriage, whether ceremonial or common-law, although the character of the evidence might be different, is proved as any other fact might be proved. See, for example, *Claveria's Estate v. Claveria*, 615 S.W.2d 164 (Tex.1981).

The provisions of Art. 38.11, supra, which prohibit husband or wife from testifying against each other, except in certain enumerated instances not applicable here, were not enacted to protect those persons "who are not legally married, nor parties who are unmarried, but who live together and recognize each other as husband and wife." *Johnson v. State*, 54 S.W.2d 140, 141 (Tex.Cr.App. 1932). Merely living together with a person of the opposite sex and having intimate relations with that person do not establish, without more, the relationship of hus-

band and wife. See *Johnson v. State*, supra, at 141. Whether a common law marriage has been established as a matter of law, as appellant asserts occurred here, must be decided on an *ad hoc* basis.

We reaffirm the rule of law that testimony of a witness that merely constitutes a conclusion that a common law marriage exists is not sufficient, standing alone, to establish a common law marriage. See, for example, *Bush v. State*, 261 S.W.2d 158, 160 (Tex.Cr.App.1953).

It is undisputed in this cause that Miles and Appellant lived together and cohabited for approximately two months. The fact that they might have intended to go through a ceremonial marriage at sometime in the future does not necessarily negate the inference that they believed that they were married common law. *Hernandez Aguilar v. State*, 715 S.W.2d 645, 648 (Tex.Cr.App. 1986). We find that appellant has sustained his burden as to two of the above three elements that would establish a common law marriage. The question then becomes, did he establish the third element, a holding-out by himself and Miles to the general public that they were husband and wife? We answer this question in the negative. We find and hold that the undisputed evidence establishes at most only an illicit relationship between Miles and appellant.

Although our courts, including this one, have either expressly or implicitly held that an agreement to become husband and wife might occur in private, our research to date reveals that all courts have always required that before a common law marriage might be found to exist as a matter of law there must be evidence, inter alia, that the parties held themselves out to the general public as husband and wife. See Speer's *Texas Family Law*, Chapter 2 (1975 edition).

From the evidence that was adduced at the hearing that was held outside the presence of the jury, we find

that at most all that appellant established was that he and Miles might have had "a secret common law marriage," which does not constitute in Texas a common law marriage. See Ex parte Threet, 333 S.W.2d 361 (Tex.1960). Except for a "Harris County Pretrial Services Agency" form that is in the record, which was completed after appellant was placed in the Harris County Jail, and which pertains to possible pretrial release on bail without surety, and which was not introduced or offered into evidence at the hearing held outside the jury's presence, there is not a scintilla of corroborative evidence that might reflect or indicate that Miles and appellant held themselves out to the general public as husband and wife. This form does not appear to have been completed by appellant, but appears to have been completed by a third person based upon information that appellant gave that person. It is undisputed that at all times Miles maintained her last name and never used appellant's last name. When Miles and appellant rented an apartment, she did not use appellant's last name. Miles herself testified that she never told anyone, including her mother, that she and appellant were married. Thus, there is absolutely no non-hearsay independent testimony or evidence that Miles and appellant ever held themselves out to the general public that they were husband and wife.

Appellant's contention that he established as a matter of law at the hearing conducted outside the jury's presence, or that he established during the jury's presence, that he and Miles were married common law is overruled.

Appellant next complains of the trial judge's refusal to instruct the jury on the lesser offenses of involuntary manslaughter and criminally negligent homicide at the guilt stage of the trial. After having carefully read the record, and the definitions of what constitutes criminally negligent homicide and involuntary manslaughter, we are unable to agree with appellant that the evidence ad-

duced called for instructions on either of these lesser offenses.

In determining whether a defendant is entitled to a charge on a lesser included offense, this Court considers all the evidence presented. See, for example, *Cordova v. State*, 698 S.W.2d 107, 113 (Tex.Cr.App.1985). Also see *Lugo v. State*, 667 S.W.2d 144 (Tex.Cr.App.1984). If evidence from any source raises the issue of a lesser included offense an instruction on that offense must be included in the court's charge to the jury. See, for example, *Bell v. State*, 693 S.W.2d 434 (Tex.Cir.App. 1985).

In determining whether a lesser included offense instruction must be given, a majority of this Court has long subscribed to a two-step analysis, which was first enunciated in the panel opinion of *Royster v. State*, 622 S.W.2d 442 (Tex.Cr.App.1981), and later adopted by a majority of the En Banc Court in *Aguilar v. State*, 682 S.W.2d 556 (Tex.Cr.App.1985). Also see *Thomas v. State*, 701 S.W.2d 653, 656 (Tex.Cir.App.1985). The two-step analysis requires *first* that the lesser included offense is included within the proof necessary to establish the offense charged and, *second*, there must be some evidence in the record that if the defendant is guilty he is guilty only of the lesser offense. This "guilty only" rule of law has been interpreted by this Court to mean that if the evidence only raises the issue that the accused is guilty of the greater offense, or not guilty at all, an instruction on a lesser included offense need not be given. On the other hand, if the evidence raises the issue that, if guilty, the defendant is only guilty of the lesser offense, the instruction should be given.

The record reflects that appellant did not testify at the guilt stage of the trial, nor did he offer any evidence or testimony which might reasonably have raised the inference that if guilty, he was guilty only of criminally

negligent homicide or involuntary manslaughter. The fact that the State, in proving the offense of capital murder, also proved the lesser offense of criminally negligent homicide or involuntary manslaughter does not, standing alone, entitle appellant to a charge on the lesser included offenses of criminally negligent homicide or involuntary manslaughter. See, for example, *Cordova*, supra.

The evidence reflects that appellant's twenty-four year old female victim, who was employed at Hermann Hospital in Houston as a pharmacist, left work at approximately 11:15 o'clock p.m. on Sunday, January 25, 1981. Approximately one hour later, her automobile was found abandoned, with its engine running, its lights on, and its doors closed, but not locked. Evidence was also presented from which one might infer that her wrong doer caused her to stop her car and thereafter kidnapped or abducted her. The victim's gagged and bound body was found during the morning hours of January 27, 1981 tied to a tree, which was located near the residence of the person who ultimately discovered her body. The record reflects that this person first only saw an object that had a bedsheet draped over it, which later fell to the ground, thus later enabling this person to identify the object as the body of a human being, which later was identified as the deceased. The victim's hands were tied tightly behind her back and a piece of shirt was tied around her neck and connected to her hands. The victim's feet were tied together with a bed sheet and an electrical cord. The entire system of knots and materials was very tight and the body appeared to have been previously under a lot of tension. However, the evidence also reflects that there was enough slack that would have allowed some movement of the victim's knees and shoulders. There was also evidence that the tree the body was leaning against showed "scuff marks up and down", from which, with the bruises and abarsions found on the body, one might infer that the victim had attempted to escape. A

gag of bed sheet material was, as was the victim's tongue, stuffed deep into the posterior pharynx, which is the rearmost portion of the mouth. There was also a gag wrapped wrapped tightly around the body's mouth. Dr. Joseph A. Jachimczky, the world renowned Chief Medical Examiner for Harris County, performed an autopsy on the body of the deceased after which he concluded that the cause of death was suffocation due to gagging from the cloth gag found inside of the body's mouth. Jachimczyk also testified that if there was "no air coming in", it would take between 3 to 5 minutes after the gagging took place before Berry suffocated to death. Jachimczyk further testified that gagging is "as sure as sure a way" to cause someone's death, and that "if the degree of gagging is adequate, a person is just as dead from that as they are from a gunshot wound." The exact time of death could not be determined.

The evidence also established that between the time when Berry, the victim, disappeared until her body was found, appellant had used her bank teller card to obtain $1,000. There was also evidence that on the evening when Berry was last seen alive appellant was financially embarrassed, but soon thereafter appeared to have much money. There is no evidence in the record that might reflect or indicate that appellant had ever met or even seen his victim before the evening in question.

Although appellant gave a written confession to committing the crime, the trial judge, pursuant to appellant's motion to suppress, after first ruling that the confession was admissible evidence, later ruled that the confession could not be used against appellant. In his confession, appellant stated that he had tied and gagged his victim solely to keep her from escaping and seeking help while he went and used the victim's bank card to obtain money. The confession reflects that when appellant returned to where the victim had been gagged and tied to the tree he saw that she was then dead, thus causing him to panic

and ultimately flee to Austin where he was arrested on January 28, 1981.[7]

Appellant contends that he was entitled to an instruction on the lesser offense of criminally negligent homicide because the evidence clearly supports the finding that he caused Berry's death negligently, rather than intentionally. Given the above, and the penal code definition of criminally negligent homicide, we disagree.

Criminally negligent homicide may be a lesser included offense of involuntary manslaughter, which may be a lesser included offense of murder, which may be a lesser included offense of capital murder. See, for example, *Lugo v. State*, 667 S.W.2d 144, 147 (Tex.Cr.App.1984).

V.T.C.A., Penal Code, Section 6.03 (d), defines "Criminal Negligence" as follows: "A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct *when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.*" (Our emphasis.)

Recently, in *Mendietta v. State*, 706 S.W.2d 651, 653 (Tex.Cr.App.1986), a majority of this Court ruled that "It is incumbent that the record contain evidence showing *an awareness of the risk* before a charge on criminally negligent homicide is required."

We cannot conclude from the evidence that was presented that one might infer therefrom that when ap-

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[7] It appears that had appellant's written confession been admitted into evidence, the issue that appellant presents might call for a conclusion different from the one . . . .

pellant gagged, tied his victim's hands tightly behind her back, tied a piece of shirt around her neck, which was connected to her hands, tied her feet together with a bed sheet and an electrical cord, with the entire system of knots and materials used to tie her to a tree tied very tight, that he was then unaware of the risk his conduct created. Just because it might be speculated that appellant did not intend the result, given the admissible evidence, such does not change his awareness or perception of the risk his conduct created. We find and hold that the issue of criminally negligent homicide was not raised by the evidence. The trial court did not err in refusing to give the jury an instruction on that offense. Also see *Still v. State*, 709 S.W.2d 658 (Tex.Cr.App.1986); *Thomas v. State*, 699 S.W.2d 845 (Tex.Cr.App.1985); *Hunter v. State*, 647 S.W.2d 657 (Tex.Cr.App.1983); *Lewis v. State*, 529 S.W.2d 550 (Tex.Cr.App.1975).

Much of what we have stated above is also applicable to appellant's claim that the trial judge erred in not instructing the jury on the lesser offense of involuntary manslaughter.

One of the ways that the offense of involuntary manslaughter might be committed is if the defendant *recklessly* causes the death of another individual. See V.T.C.A., Penal Code, Section 19.05 (a)(1). The culpable mental state of recklessly is defined as follows in V.T.C.A., Penal Code, Section 6.03 (c): "*A person acts recklessly, or is reckless*, with respect to circumstances surrounding his conduct or the result of his conduct *when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur*. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's viewpoint." (Our emphasis.) As previously pointed out, appellant did not testify or offer

any evidence that he caused his victim's death by a reckless act. Without evidence that appellant acted recklessly in causing the death of his victim we cannot state that the issue of involuntary manslaughter was raised by the evidence that was presented at the guilt stage of the trial. Cf. *Lugo v. State*, supra. Contrary to criminal negligence, which arises when a person ought to be aware of a substantial risk that the circumstances exist or the result will occur, involuntary manslaughter arises when a person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. We are unable to infer from the evidence that was presented that the issue whether appellant ought to have been aware of a substantial risk when he gagged and bound his victim to a tree and that might have caused her death was raised. The evidence reflects appellant left enough slack that would have allowed some movement of his victim's knees and shoulders. Thus, this act itself reflects that he was not "reckless" as the term is defined. Also see *Gordon v. State*, 640 S.W.2d 743 (Tex. App.—4th 1982), no P.D.R.

Appellant also argues under his contention regarding his claim that the trial judge erred in not instructing the jury on the lesser offenses of criminally negligent homicide and involuntary manslaughter that the Supreme Court decision of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), also see *Keeble v. United States*, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973), mandates such instructions be given. We disagree. There, the Supreme Court held that where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction of the alleged offense, thus requiring that the jury be given the option of convicting the defendant of some lesser included offense. Although we do not disagree with what the Supreme court stated in the above cases,

we find that *Beck*, supra, is factually distinguishable from the instant case. In *Beck*, supra, the defendant testified at trial and denied that he killed his victim or intended his victim's death, whereas here appellant did not testify or present any evidence from any source that he possessed only the intent to either rob or kidnap Berry. E.g. *Santana v. State*, 714 S.W.2d 1, 9 (Tex. Cr. App. 1986).

Appellant's contentions that the trial judge erred in refusing to instruct the jury on the lesser offenses of criminally negligent homicide and involuntary manslaughter are overruled.

Appellant next contends that "The trial court erred in overruling has objection to the prosecution having placed on the stand and eliciting testimony from [Jean Matthews, a Virginia] penal psychologist, who had consulted with Appellant in 1979 [, when he was incarcerated in the Virginia penitentiary,] for the reason that neither Appellant nor his counsel were notified in advance that the psychologist's testimony would encompass the Appellant's future dangerousness."

To fully understand and appreciate appellant's complaint, which at first blush appears frivolous, but which we find is not, we believe that it is necessary to give a little background information on appellant that pertained to when he was incarcerated, that relates to other than Matthews' testimony.

The record reflects that at the punishment stage of the trial the State established that in 1977 appellant was received by the Virginia Department of Corrections, Commonwealth of Virginia, after he had been convicted in a trial court of Virginia for committing the offenses of "Statutory Burglary" and "Grand Larceny." Evidence was also presented that when appellant was incarcerated in the penitentiary he became a "straw boss", who was an inmate given orders by employed personnel

to keep other inmates in line and to relay to them what the employed personnel desired to be done or accomplished on behalf of the penal institution. Appellant was a "straw boss" for Herbert E. Norman, who was then Assistant Director of Recreation and a crew foreperson for the Department of Corrections. Appellant had the job of "straw boss" for approximately two years, which encompassed most of the time he was incarcerated in the Virginia penitentiary. Norman testified that the reason that appellant was given the job of "straw boss" was because "nobody gave Mr Tompkins a hassle. He had a way to handle himself pretty good and he had a way with himself, and he could get across what I had to get across." Appellant also assisted Norman in refereeing football and softball games that occurred between inmates. There was testimony that appellant, like many other inmates, would occasionally get into fights with other inmates.

The record also reflects that appellant was released from the penitentiary on February 28, 1980, when he was placed on parole. He remained on parole until July 9, 1980, when the parole officer's file on him was closed because he was "an absconder." A warrant for his arrest issued, however. The warrant was executed in our capital city, Austin, the day of appellant's arrest in this cause. See *ante*.

The record also reflects that while incarcerated in the Virginia penitentiary, appellant came into contact with Jean Matthews, a Ph.D. who was a "clinical-correctional psychologist" and head of the Psychology Services at Saint Brides Correctional Center in Chesapeake, Virginia. Although Matthews' credentials qualified her as an expert in her field of psychology, there is no testimony or evidence in the record that she has ever been licensed or certified by the Commonwealth of Virginia or any other State of the Union as a "clinical-correctional psychologist". The record, however, reflects that the par-

ties treated her as though she was an expert in her field of endeavor.

The record reflects that appellant, while incarcerated and on his own volition, went to Matthews where he requested that she give him "specific kinds of help" that related to his inability to sleep and eat, and his problems with depression. Matthews saw appellant approximately a total of eight times, but never administered any clinical tests nor did she prescribe any medication for him. This occurred between July, 1979 and December, 1979. Matthews also had occasion to observe appellant when he was outside of her office in the prison yard, and once observed him fighting with another inmate, in which fight she stated that appellant "shattered" the other inmate's jaw. Matthews testified that from her interview sessions with appellant she concluded that "[h]e was frequently depressed"; "he has a wide range of characteristics from being a very nice, & very congenial person to being placating, manipulative, and from time to time, threatening and violent. He had a hard time controlling his temper. . . [T]he intensity [of emotion] with Phil is very great. . . but the intensity of emotion that he felt was out of proportion to the actual problem. . . . He has this wide range of behavior as crying and maybe being very happy ,or very joyous or very sad or very angry, and he didn't seem to be able to control which of those things came out in any given situation." From her interviews with appellant, Matthews concluded that appellant did not want to be and could not be rehabilitated, "[u]nless he were given some intensive psychotheraphy and he desired to have that kind of change. It would take quite a bit of doing." Although Matthews further testified that appellant's propensity to commit future acts of violence was "unpredictable", she also testified that in her opinion there was a probability that appellant would continue to commit criminal acts of violence that would constitute a threat to society.

Matthews admitted in her testimony that another psychologist might "draw different conclusions and opinions [of appellant]" than she did.

Appellant's sole objection at trial to Matthews' testimony was the following: "We have objections to any questions or answers in regard to the relationship between [Matthews] the psychologist and the inmate [appellant]." It is highly questionable whether the claimed error is properly before us for review. Nevertheless, given the fact that appellant has been assessed the death penalty, we will assume that his contention is properly before us for review.

Appellant argues that "the introduction of the prison psychologist from her communications with Appellant during his compelled incarceration period while in a Virginia Correctional institution in 1979 was and remains privileged under Article 5561h, Vernon's Ann. (Texas) Civil Statutes and therefore was not available to the State for any purpose. (Citations omitted.) Appellant also argues that such testimony was admitted in violation of *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 369 (1981). At no time, however did appellant expressly invoke in the trial court the provisions of the above statute, and, although appellant brought out during his voir dire examination of Matthews the fact that Matthews did not give him the *Miranda* warnings when she interviewed him, see *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), at no time did appellant complain, either expressly or implicitly, that Matthews' testimony was obtained in violation of the holding in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), which was decided on May 18, 1981, almost four months to the day after appellant committed the offense at bar and before he was tried in this cause.

In *Smith*, supra, the Supreme Court held that a psychiatrist's testimony on future dangerousness, which

had been obtained pursuant to a court-ordered psychiatric examination only to determine the accused's competency to stand trial, was inadmissible evidence because it violated the accused's Fifth Amendment privilege against compelled self-incrimination and also violated the defendant's Sixth Amendment right to counsel because court appointed defense counsel was not notified in advance that the psychiatric examination would encompass the issue of future dangerousness.

We have diligently searched the record of this cause for an objection by appellant to Matthew's testimony on the basis of *Smith*, supra, error, but have yet to find such an objection, and appellant does not point to any place in the record where he objected in the trial court on this basis. In *Granviel v. State*, 723 S.W.2d 141 (Tex.Cr. App.1986), this Court held that a failure to object on the basis of *Smith*, supra, error, where the accused's trial occurs after *Smith*, supra, had been rendered, waived any *Smith*, supra, error. which we find occurred here. Furthermore, given the facts upon which appellant relies on appeal to raise *Smith*, supra, error, and the facts that are in *Smith*, supra, we find appellant's reliance on *Smith*, supra, sorely misplaced. The record clearly reflects that Matthews' interviews with appellant were only done at appellant's insistence, and not at the command of Matthews or any other state official. Matthews' did not "compel [appellant] to speak [with her] where he would not otherwise [have done] so freely," *Granviel*, supra. Lastly, when Matthews spoke with appellant, she was not ordered by any court to speak with him.

Appellant's complaint, as it relates to *Smith*, supra, error, is overruled.

We will next determine whether appellant was entitled to invoke and have applied to this cause the provisions of Art. 5561h, V.A.C.S., as that statute was worded when appellant's trial occurred. This statute became effective August 29, 1979; was amended effective Septem-

ber 1, 1983, but repealed effective September 1, 1983, by order of the Supreme Court of Texas, "insofar as it relates to civil actions." Appellant's trial occurred in 1981. Insofar as it might relate to criminal prosecutions, the statute has been replaced by Rule 509, Tex.Rules of Crim. Evid., effective September 1, 1986. For prior discussion of Art. 5561h, supra, see *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex.1985); *Ex parte Abell*, 613 S.W.2d 255 (Tex.1981); *Wimberly Resorts Property, Inc. vs. Pfeuffer*, 691 S.W.2d 27 (Tex.App.-Austin 1985); *Heflin v. State*, 640 S.W.2d 58 (Tex.App.-Austin 1982), P.D.R. refused; *Gaynier v. Johnson*, 673 S.W.2d 899 (Tex.App.-Dallas 1984); *Wade v. Abdnor*, 635 S.W.2d 937 (Tex.App.-Dallas 1982); *Tumlinson v. State*, 663 S.W.2d 539 (Tex.App.-Dallas 1983), P.D.R. refused. Also see Art. 4495, V.A.C.S., and the discussion pertaining thereto that is found in this Court's decision of *Blunt v. State*, 724 S.W.2d 79 (1987).

We find that the State, in its response to appellant's contention, correctly argues that appellant cannot rely upon the provisions of Art. 5561h, supra, for several reasons: (1) Matthews was not shown to be authorized to practice *medicine* either in Virginia or Texas, or in any other State of the Union for that matter, and (2) there is no evidence that Matthews was licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional condition or disorder. We also find that appellant did not testify or offer any testimony or evidence that when Matthews interviewed him he reasonably believed that she was authorized to practice medicine in Virginia or reasonably believed she was licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional condition or disorder. Therefore, we find and hold that appellant has failed to satisfy one very important condition precedent in his claim that Matthews was prohibited from testifying because of the above stat-

ute, namely, Matthews was shown to come within the provisions of the statute.

Our disposition of appellant's contention does not stop here however, because, given the fact that the situs of the interviews between appellant and Matthews occurred in Virginia, we must determine whether, under conflicts of law, Matthews would have been prohibited from testifying in a Virginia criminal prosecution about her conversations with appellant, and the conclusions she drew therefrom. Although the evidence did not establish that Matthews was either a licensed or certified "clinical-correctional" psychologist in Virginia, because the parties treated her as having been licensed or certified by the State of Virginia, we will assume for argument purposes that she was licensed or certified by that State. Under *Ex parte Mason*, 656 S.W.2d 470 (Tex.Cr.App.1983), if this Court may ascertain with reasonable certainty what the law of another state might be, it is proper for this Court on its own to seek out that law. Our travels have led us to the Legislative Reference Library of this State where we found The Code of Virginia.

The Code, see § 8.01-400.2, Civil Remedies and Procedure, which governs communications between counselors, social workers, psychologists and patients, is worded similarly to Art. 5561h, supra, except that it is restricted to *civil* actions. The Virginia Supreme Court held in *Gibson v. Commonwealth*, 216 Va. 412, 219 S.E. 2d 845 (1975), that in Virginia there exists no physician-patient privilege in a criminal prosecution. See Virginia Code provision § 8.01-399, supra, which governs the physician-patient privilege in that state. We find that such holding would also govern the psychologist-patient relationship. Thus, under the doctrine of conflicts of law, Virginia law is of no assistance to appellant in his claim that the trial court erred in permitting Mathews to testify at the punishment stage of his trial. Also see 12 *Tex.Jur.3rd Edition*, "Conflict of Laws"; Leflar, American Conflicts of Law (1968 edition), Section 123; 56 *Columbia Law Review* (1956); Weinstein, "Recognition in the United States of the Privileges of Another Jurisdiction," at 543.

Appellant's contention that the trial court erred in permitting Matthews to testify at the punishment stage of his trial is overruled.

Appellant next claims that he is entitled to a new trial because the trial court over objection erred in permitting the State's witnesses George Drummond and Charles William Murphy to testify against him as reputation witnesses at the punishment stage of the trial. We disagree.

We first observe that Art. 37.071, V.A.C.C.P., provides, inter alia, that in a capital murder sentencing proceeding "evidence may be presented as to any matter that the [trial] court deems relevant to sentence." This Court has held that a defendant's reputation for having a particular character trait may be admissible evidence at the sentencing stage of a capital murder case. See, for example, *Nethery v. State*, 692 S.W.2d 686, 707 (Tex. Cr.App.1985).

The record reflects that the State called Drummond to testify at the punishment stage of the trial and he testified that he had formerly been appellant's parole officer in Virginia after appellant was released from the Virginia penitentiary in 1980. See *ante*. Drummond also testified that in his opinion appellant's reputation "in the community in which he lives for being a peaceful and law-abiding citizen" was bad. Drummond formed his opinion after having spoken with appellant's neighbors, his friends, and members of his family that he, appellant, had when he lived in Virginia.

Murphy testified that he was a Virginia Trooper and that in his opinion appellant's reputation "for being a peaceful and law-abiding citizen" was bad. Murphy

formed his opinion after he had conversations with "The sheriff down in King and Queen County, Virginia and several other troopers . . ., talking with citizens in King and Queen County in the Cothorville area where Mr. Tompkins resided when he was in Virginia."

Appellant relies upon *Wright v. State*, 609 S.W.2d 801 (Tex.Cir.App.1980), as authority for his contention that neither Drummond nor Murphy were qualified to testify to his reputation for being a peaceful and law-abiding citizen when he lived in Virginia. We strongly disagree with appellant.

We first find that appellant's reliance upon *Wright*, supra, is sorely misplaced. The facts in *Wright*, supra, show that the defendant in that cause grew up in Dallas and the "bad" reputation witness who testified against him was a highway patrolman who lived in San Antonio and worked exclusively in Bexar County. It appears that the patrolman came into contact with appellant when he stopped appellant for violating some traffic law while in Bexar County. It also appears from the opinion that the sole basis for the reputation witness's testimony, that the defendant's reputation was bad, was a conversation that he had had with the prosecuting attorneys in that cause prior to the trial of the case. The defendant was tried in Dallas County. This Court held that the highway patrolman was not qualified to testify as a reputation witness against the defendant. In the concurring opinion that Judge Roberts filed in that cause, he correctly emphasized that a reputation witness's knowledge of another person's reputation for having a particular character trait or traits is gained by the members of the community in which the person lives or lived: "This appellant's community was in Dallas; he lived there and had been reared there. Yet the prosecuting attorneys called a reputation witness who never had worked in Dallas and who never had talked about the appellant to anyone other than themselves."

Here, however, both Drummond and Murphy's knowledge of appellant having a bad reputation for being a peaceful and law-abiding citizen was not limited as it was in *Wright*, supra, but instead rested on knowledge that they obtained from other persons in communities in Virginia where appellant had previously resided. Also see *Wagner v. State*, 687 S.W.2d 313 (Tex.Cr.App. 1984) (On appellant's motion for rehearing); and *Jackson v. State*, 628 S.W.2d 446, 450, fn. 2 (Tex.Cr.App. 1982).

We point out that appellant did not complain in the trial court, nor does he complain on appeal, that Drummond and Murphy were not qualified because the persons that they had had conversations with never specifically told them that appellant's general reputation for being a peaceable and law-abiding person was bad. See *Jackson*, supra. Notwithstanding this specific omission in the record, we nevertheless find and hold that given the fair import of the witnesses' testimony, such indicates that the persons with whom they had discussed appellant's reputation for not being a peaceable and law-abiding person told them that appellant's reputation for those traits was bad. Therefore, we hold that both Drummon and Murphy were qualified to express in opinion as to appellant's reputation for not being a peaceable and law-abiding person in the communities where they knew him and where he once resided. Cf. *Arocha v. State*, 495 S.W.2d 957 (Tex.Cr.App.1973); *Stephens v. State*, 522 S.W.2d 924, 927 (Tex.Cr.App.1975); *Ables v. State*, 519 S.W.2d 464, 466 (Tex.Cr.App.1975).

Appellant's contention that Drummond and Murphy were not qualified "bad" reputation witnesses is overruled.

Appellant next contends that he should be granted a new trial because "final arguments of the State during the sentencing phase of trial was so clearly calculated as

to inflame the minds of the jurors being of such character as to suggest the impossibility of withdrawing the impression produced on the jurors' minds."

Appellant also complains of another jury argument in the same point of error, that the same prosecuting attorney made at the punishment stage of the trial when she referred to a psychologist who testified for appellant as having "prostituted" himself when he testified on behalf of appellant. Appellant's objection to this argument was overruled by the trial judge.

We agree with appellant that neither argument was called for under this record, and both were clearly improper.

We find that appellant's first complaint goes to the fact that the prosecuting attorney referred to him in her jury argument "as an animal", to which comment trial counsel objected, the trial judge sustained the objection, instructed the jury to disregard, but overruled his motion for mistrial.

Although there appear to be decisions by this Court approving referring to the defendant as "an animal", we also find that there are many decisions of this Court which have reversed convictions because of such remarks as were made here. See the cases collated in *Erisman's Manual of Reversible Errors in Texas Criminal Cases* (1956 edition), § 529. Whether such an argument will constitute reversible error, however, must be decided on an *ad hoc* basis.

Many years ago, in *Swilley v. State*, 25 S.W.2d 1098 (Tex.Cr.App.1929) (On original submission), Judge Lattimore of this Court pointedly remarked that "there is abundant room for legitimate discussion of the testimony and the law applicable, without indulging in personal abuse of the man who is at the bar of justice."

(1099). Such an argument as was made here served no legitimate purpose except to jeopardize the State's case on appeal. In *Grant v. State*, 472 S.W.2d 531, 534 (Tex. Cr.Cr.App.1971), Presiding Judge Onion was quick to point out for the Court that it is often difficult for members of this Court to understand why a prosecuting attorney would engage in argument that is similar, but not as aggravated, as occurred in this cause. Judge Onion correctly pointed out that "Abuse is not argument, and vituperation is not logic. . . . It takes far less talent to indulge in abuse than in making an intelligent assessment of the facts and the law to aid the jurors in their task."

This Court should not have to point out that comments by the attorneys should always be confined to the record and the legitimate deductions from the testimony of the witnesses. Notwithstanding that we do not approve the above argument that referred to appellant as "an animal", it is axiomatic that it is not every improper argument made by a prosecuting attorney to the jury that requires reversal. Before reversal may occur, because of improper prosecutorial jury argument, the argument must be examined in light of the entire record and must be extreme or manifestly improper, violative of a mandatory statute, or inject new faces into the case that are harmful to the defendant. Generally, an instruction by the trial judge to the jury to disregard the argument will be sufficient to cure any error. In this instance, the trial judge instructed the jury to disregard the argument. Given the facts of the case and the trial judge's prompt instruction to the jury to disregard, we are unable to say that such argument by the prosecuting attorney might have had any effect at all on the jury's decision to answer the two special issues in the affirmative. "This Court has held that language [by a prosecuting attorney], which may be objectionable, may also be so illogical, fanciful or extravagant as to require the con-

clusion that it could not have influenced the jury in arriving at their verdict." *Brown v. State*, 353 S.W.2d 425, 430 (Tex.Cr.App.1962). We find such statement applicable here.

Appellant's second complaint gives us more concern. There is absolutely nothing in this record that might have justified the prosecuting attorney stating that the appellant's psychologist "prostituted himself on the witness stand." We find that when a prosecutor or a defense attorney uses the opprobrious term "prostitute" against a witness in his jury argument, when such is not supported by the evidence, the term might mean to many jurors what Judge Henderson of this Court expressed almost 100 years ago in *McCray v. State*, 38 Tex.Cr.R. 609, 44 S.W. 170 (Tex.Cr.App.1898): "In common experience, it is known that persons who are so morally degraded as to ply their vocation as common prostitutes are not on a plane with the mass of people who follow legitimate and honorable vocations, in the matter of integrity. As a general rule, they are no more capable of telling the truth than one who has been convicted of a felony, or of some misdemeanor involving moral turpitude, and they are not more worthy of belief than such a one." Also see *Cravens v. State*, 687 S.W.2d 748 (Tex.Cr.App.1985). The trial judge clearly erred in not sustaining appellant's objection, albeit it was a general one. Also see and compare *Gomez v. State*, 704 S.W.2d 770 (Tex.Cr.App.1985).

Notwithstanding our strong disapproval of the prosecuting attorney's argument, referring to the defense witness as "a prostitute", we find that appellant did not properly and timely perfect the error. First, he has not set forth his contentions in separate points of error. See, for example, *Kendrick v. State*, 481 S.W.2d 877 (Tex. Cr.App.1972). Second, his general objection, "objection", amounts to no objection. Thus, appellant has waived his

complaint. Cf. *Zillender v. State*, 557 S.W.2d 515 (Tex. Cr.App.1977). Notwithstanding our holding, we trust that such argument, unless the record makes it absolutely clear that such is called for, will not again in a court of law of this State be uttered by either an attorney for the State or an attorney for a defendant.

Appellant's contentions are overruled.

Appellant complains in his last point of error of action by this Court, "The Court of Criminal Appeals erred in overruling Appellant's motion to exceed the statutory limits of Rule 202 of the Rules of Appellate Procedure in that the denial of same and the rejection of the Appellant's original brief on appeal deprives this Appellant of his right to an effective appeal process from a judgment of conviction where the sentence imposed is death by lethal injection."

Under Rule 202 of the Appellate Rules, as it existed when appellant attempted to file his first brief, which was 144 pages in length, this brief clearly exceeded the then 50 page rule limitation, and this Court properly denied him permission to file that brief. Thereafter, appellant timely filed a well written brief that numbered only 47 pages. We have carefully compared the two briefs and find that, other than the original brief being more detailed, substantively, they are the same.

In considering all of appellant's points of error, we have carefully considered his contentions as set out in his original brief as well as the brief that was timely and properly filed, which we find is all that appellant is asking us to do in his last point of error.

Therefore, appellant's last contention is overruled.

Having carefully reviewed all of appellant's contentions, and finding that none merit this Court reversing appellant's conviction or sentence of death, the trial

court's judgment of conviction and sentence of death are affirmed.

TEAGUE, Judge

EN BANC

DELIVERED: October 7, 1987

PUBLISH

Onion, P.J., and McCormick and Duncan, J.J., concur in the result.

DISSENTING OPINION

This cause presents once again the conundrum of two lesser "culpable mental states:" recklessness and criminal negligence. Slip Opinion, at 20-25. The majority ultimately finds no evidence raising either. However, there are problems in its determinations of law germane to making those findings.[1]

This cause provides an opportunity to consider that interpretations and applications of § 6.03(c) and (d),

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[1] At the outset, in the course of discussing entitlement to a charge on a lesser included offense, on one page the opinion iterates usual rules about considering "*all* the evidence presented," and if evidence "from *any* source raises the issue" an appropriate charge must be given," citing correct authorities for those propositions. *Id.*, at 20. (All emphasis is mine throughout unless otherwise noted.) On the next page, however, the opinion says the fact that the State's proof of the greater offense "also proved the lesser offense . . . does not, standing alone, entitle appellant to a charge of the lesser included offense," citing Cordova v. State, 698 S.W.2d 107 (Tex. CR. App. 1985)—which was earlier cited to support the first rule! Both cannot be right, and from our cases the second is wrong.

The only authority for the second is "See *Aguilar* [v. State, 682 S.W.2d 556 (Tex. Cr. App. 1985)], and seeing it makes abundantly clear that *Aguilar* holds no such thing. Compare *Aguilar*, at 558: "Merely because a lesser offense is included within the proof of a greater offense, however, *does not always* warrant a jury charge on the lesser offense." But that it is so included may warrant the charge. Bell v. State, 693 S.W.2d 434, at 442 (Tex. Cr. App. 1985). Thus we may look to the proof adduced by the State, just as the majority does here. See Campbell v. State, 571 S.W.2d 161, 162 (Tex. Cr. App. 1978).

First the majority says appellant's conduct precludes an inference "that he was then unaware of the risk his conduct created," and speculation that he did not intend the result "does not change his *awareness or perception* of the risk his conduct created." Slip opinion, at 23. So much for criminally negligent homicide. Next it says, "Without evidence that appellant acted recklessly in causing the death of his victim [involuntary manslaughter was not raised]." *Id.*, at 24. But the majority had just found appellant *was* aware of the risk.

in opinions primarily by Judge Odom, were accepted by the Court for several years, only to be suddenly rejected in a recent opinion crafted by Judge W.C. Davis, and to determine which view is correct.[2] Remember, strictures placed on rights of an accused in one case will also have an impact on the State in satisfying its burden of proof in another. See note 7, *post*.

Under § 6.03(c) and (d), "risk" is an essential condition; it is created by acts of accused, here with respect to result of his conduct. It must be both "substantial" and "unjustifiable." Once he has created that kind of risk an actor is either aware of it or *ought* to be aware of it. The Court has characterized the former as "conscious risk creation," the latter as "inattentive risk creation." Lewis v. State, 529 S.W.2d 550, 553 (Tex.Cr. App. 1975). Practice Commentary to § 6.03.[3]

An awareness may be inferred from the facts, but that one *ought* to be aware is a judgmental factor, along with

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[2] The Odom view takes an analytical approach to the facts of the matter and a weighing of judgmental factors by a factfinder, rather than looking for evidence that directly and nicely fits either socalled "mental state." In these two instances more than many others, the several judgment calls must be left to factfinders. See Giles v. State, 617 S.W.2d 690, 691 (Tex. Cr. App. 1981); Dillon v. State, 574 S.W.2d 92, 94 (Tex. Cr. App. 1978)—both written by Judge Odom. See also Lopez v. State, 630 S.W.2d 936 (Tex. Cr. App. 1982), by Judge McCormick, following *Giles* and *Dillon*. Compare *post* the Davis evidentiary view in, e.g., Simpkins v. State, 590 S.W.2d 129, 134 (Tex. Cr. 1979), and Thomas v. State, 699 S.W.2d 845 (Tex. Cr. App. 1985); see my dissenting opinion in the latter.

[3] *Criminal negligence* . . . does not require consciousness of risk. Rather the definition of criminal negligence in Subsection (d) inquires of the factfinder whether the actor *ought* to have been aware of the risk. As in recklessness, the risk must be substantial and the failure to perceive it an unjustifiable and gross deviation from the ordinary standard of care; however, the actor's conduct is weighed against an objective standard, that of the ordinary prudent man." (emphasis in original).

others, at work here.[4] A failure to comprehend that concept is, in my view, revealed in two sentences written by Judge Davis in his panel opinion in Simpkins v. State, 590 S.W.2d 129 (Tex.Cr.App. 1979), *viz*:

> "However, the evidence in this case did not raise the issue of [negligent homicide]. *No evidence indicates* that the appellant possessed the requisite culpable mental state for negligent homicide, i.e., that he *ought* to have been aware of a substantial and unjustifiable risk."

Id., at 134. (Second emphasis is by the Court.) That notion lay dormant for a while, only to be revitalized by Judge Davis in Thomas v. State, 699 S.W.2d 845 (Tex. Cr.App. 1985).

Following behind *Thomas*, Mindieta v. State, 706 S.W. 2d 653 (Tex.Cr.App. 1986), changed the formulation somewhat: "It is encumbent [sic] that the record contain evidence showing an *unawareness* of the risk before a charge on criminal negligent homicide is required. *Thomas v. State*, supra."[5]

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[4] "The adjectives 'substantial,' 'unjustifiable,' and 'gross' in the definitions . . . are admittedly vague and intended to only to focus on the judgmental factors the fact finder must weigh . . . . As forthrightly stated by the Model Penal Code reporter:

> 'Some principle must be articulated, however, to indicate what final judgment is demanded after everything is weighed. There is no way to state this value-judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the conduct and determine whether it should be condemned. * * * * The jury must find fault and find it was substantial. . .' "

Practice Commentary following § 6.03.

[5] In *Thomas*, disdaining *stare decisis*, a majority did indeed criticize several prior opinions of the Court, *viz*:

> "The attendant circumstances from which the defendant's mental state can be inferred must be collectively examined in light of the definition of criminally negligent conduct. See

That a person "ought to be aware" is not a matter of fact, readily susceptible to direct testimonial proof.[6] Whether under given facts and circumstances one "ought to be aware" of risk is a value judgment—a matter of ordinary care, caution and prudence. Illustrative is Dockery v. State, 542 S.W.2d 644 (Tex.Cr.App. 1976) (Opinion on Rehearing), *viz*:

> "We *conclude* that the *actions of appellant were sufficient to indicate that he ought to have been aware of the substantial and unjustifiable risk* that his conduct might injure and kill the deceased, at whom the pistol was quite obviously pointed at the time it was fired. Clearly, the risk was of such a nature and degree that it constituted a gross deviation from the standard of care prescribed by Sec. 6.03(d)."

V.T.C.A. Penal Code, Sec. 6.03(d). In this respect [two prior opinions] are overbroad because they rely only on the pointing of a loaded weapon as being sufficient to raise criminally negligent homicide. *Other evidence* raising the issue of whether or not a defendant was aware of the risk *must* be presented before such charge is required.

Thomas, supra, at 850; in note 2, one of the two, Giles v. State, 617 S.W.2d 691 (Tex. Cr. App. 1981), is faulted for not providing "enough information from which to determine whether the defendant *ought to have but did not perceive* a substantial and unjustifiable risk in pointing a gun he knew was loaded at another." That criticism demonstrates the author of *Thomas* did not understand the issue in *Giles* refusal to charge on "*reckless*" *involuntary manslaughter*, not criminally negligent homicide; full facts of the incident *as claimed by accused* are excerpted from his confession and reproduced in the opinion. See *Giles*, at 691. In context the issue is, after all, defensive in nature and the question is whether *some* evidence raised it, not general evidentiary sufficiency. Moore v. State, 574 S.W.2d 122, 124 (Tex. Cr. App. 1978).

[6] Are witnesses to be permitted to say that accused was or was not obliged to be aware of a substantial and unjustifiable risk? Neither is a statement of fact; each is nothing but an expression of pure opinion. The factual evidence before the factfinder remains the same, and the "ought" requirement is for the factfinder to impose. See *ante*, n.3.

Id., at 648.[7]

In Hunter v. State, 647 S.W.2d 657 (Tex.Cr.App. 1983), implicitly the Court went through a similar exercise. After reciting the facts and stating general propositions of law regarding charging of lesser offenses, the Court sets out verbatim § 6.03(d), underscoring the "ought to be aware" et cetera clause. Reprising salient testimony of appellant, the Court concluded, "This testimony raised an issue as to whether appellant was negligent *in not perceiving the risk* which his conduct created." *Hunter*, supra, at 659. Obviously, from its treatment of the issue the Court had first concluded a jury could reasonably hold that accused ought to have been aware of the risk and he failed to perceive it.[8]

Unlike all homicide cases discussed *ante*, where death resulted from use of a deadly weapon, here the cause of death is suffocation caused by a gag inside and in the

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[7] *Thomas* speciously says, "The value of *Dockery* is limited because the rationale is not entirely clear as it focused on the distinction between voluntary action and intentional and unintentional acts." *Id.*, at 850. Clarity, like Beauty, is in the eye of the beholder. Accused was convicted of negligent homicide in the first degree under our former penal code; after setting out allegations and essential proof, the Court stated, "The issue then is whether the conduct alleged and proved is an offense under the new Code." *Dockery*, at 647-648. The Court concluded it was, namely, criminally negligent homicide denounced by V.T.C.A. Penal Code, § 19.07(a). *Id.*, at 650.

[8] In Mendieta v. State, 706 S.W.2d 651 (Tex. Cr. App. 1986), quoted and followed by Judge Teague, the Court distinguished *Hunter*, saying certain testimony "showed that Harris [sic] was unaware of the risk his conduct was creating." 706 S.W.2d at 653. That analysis of *Hunter* is too simplistic, however. The point is that the Court determined it was for the judgment of the jury whether he ought to have been aware of the risk and, if so, was negligent in failing to perceive it.

back of mouth of deceased. Appellant did not testify, and content of his written confession was not before the jury; he did not affirmatively present witnesses on his behalf. So basically the facts are appellant abducted deceased, gagged and tied her up and to a tree.

Following the Davis view, the plurality would have the Court find appellant was not entitled to instructions on criminally negligent homicide and "reckless" involuntary manslaughter. What of the Odom view?

That a risk was thus created cannot be disputed. "If it is not a risk of which one ought to be aware, then either criminally negligent homicide nor involuntary manslaughter would [be] shown." The risk created by appellant was death of his victim. "Upon consideration of recklessness versus criminal negligence, whether one is aware of a requisite risk or simply should be aware of it, is a conclusion to be drawn through inferences from all the circumstances by a trier of fact." The jury was not given an opportunity to make any such conclusion. "Whether one 'ought to be aware' of the risk is a matter of the character of risk involved." Under the circumstances a jury could have regarded a risk of death to be "substantial" and surely "unjustifiable." "The issue [in involuntary manslaughter] is . . . whether, given all the circumstances, it is reasonable to infer that the particular individual on trial was in fact aware of the risk." The jury could just as well have made that inference. Nash v. State, 664 S.W.2d 343, 344 (Tex.Cr. App. 1984); Lopez v. State, 630 S.W.2d 936, 941-942 (Tex.Cr.App. 1982), quoting approvingly from Dillon v. State, 574 S.W.2d 92, at 94 (Tex.Cr.App. 1978), and "seeing also" that his failure to perceive that risk was a gross deviation from the proper standard of care.

When it appears an accused ought to be aware of a requisite risk, then also raised is the issue of whether he was in fact aware of the risk and consciously disregarded it. "Which of the two inferences regarding the accused's awareness of the risk is correct is a matter to be drawn from the circumstances by the jury. *Dillon v. State*, [supra]." *Giles*, supra, at 691.[10]

In the Odom view it was therefore error to refuse to charge the jury on the lesser included offenses of involuntary manslaughter and negligent homicide so that the jury could decide whether to infer recklessness or negligence or intent to kill. Instead, the jury was permitted only to convict of capital murder or to acquit. See *Giles*, at 691. In the Davis view it was not error.

Because the plurality opinion is internally contradictory and will not solve the conundrum we have created, I respectfully dissent?

CLINTON, Judge

DELIVERED: October 7, 1987

EN BANC

PUBLISH

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[10] Moore v. State, 574 S.W.2d 122 (Tex. Cr. App. 1978), demonstrates the converse. Accused was indicted for murder, convicted of involuntary manslaughter and on appeal asserted error in failing to charge on criminally negligent homicide. Referring to certain testimony, Judge Dally wrote for a Court panel:

> "This evidence is sufficient to raise an issue of reasonable doubt whether the appellant was aware of but consciously disregarded a substantial but unjustified risk that her conduct would result in the death of deceased [i.e., involuntary manslaughter]. The jury, if it believed this evidence, could have found that appellant ought to have been, but was not, aware that her conduct would create a substantial and unjustifiable risk resulting in the death of the deceased [i.e., criminally negligent homicide].

Id., at 124. Accord: Ormsby v. State, 600 S.W.2d 782 (Tex. Cr. App. 1980).

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, November 12, 1987

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the Appellant's Motion for Rehearing in Cause No. .

(Judges Duncan & Miller would grant on ground #1—Judge Clinton would grant on grounds #1 & #2)

Sincerely yours,

THOMAS LOWE, Clerk

SUPREME COURT OF THE UNITED STATES

No. 87-6405

PHILLIPE D. TOMPKINS,
Petitioner

v.

TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 16, 1988

Justice O'Connor took no part in the consideration or decision of this motion and petition.

SUPREME COURT OF THE UNITED STATES

No. 87-6405

PHILLIPE D. TOMPKINS,
Petitioner

v.

TEXAS

The order of May 16, 1988, granting the petition for a writ of certiorari is amended to read as follows: "The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition. Justice O'Connor took no part in the consideration or decision of this petition."

June 13, 1988

Supreme Court, U.S.
FILED
JUL 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 87-6405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILLIP D. TOMPKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals misinterpreted this Court's decision in *Beck* v. *Alabama*, 447 U.S. 625 (1980), in holding that requested instructions on lesser included offenses were not required in this capital case.

2. Whether the Texas Court of Criminal Appeals applied erroneous standards under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), in holding that the prosecution had satisfactorily explained its use of peremptory challenges to exclude all blacks from the jury.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
A. Course Of Prior Proceedings	1
B. Material Facts	2
C. Refusal Of The Trial Court To Instruct The Jury On Lesser Included Offenses	4
D. The Use Of Peremptory Challenges To Exclude Black Venirepersons	6
SUMMARY OF ARGUMENT	9
ARGUMENT	
I. THE DECISION BELOW VIOLATED THIS COURT'S HOLDING IN *BECK* V. *ALABAMA*	14
II. THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISION IN *BATSON* V. *KENTUCKY*	23
A. *Batson* Requires That Prosecutors Explain The Basis For Exercising Peremptory Challenges Once The Defendant Establishes A *Prima Facie* Case Of Racial Exclusion	24
B. The Court of Appeals Misapplied *Batson*	28
1. The Texas court misappled *Batson* in approving the peremptory challenge of Leroy Green	29
a. *Batson* requires that the prosecutor's explanation be relevant as well as facially neutral	32
b. Failure to apply *Batson* cannot be excused on grounds of witness credibility	35
2. The court of appeals misapplied *Batson* in approving the challenge of Isabella Thomas	38

TABLE OF CONTENTS—Continued

	Page
a. The justification relied upon by the court of appeals was not offered by the prosecutor	39
b. The court of appeals erred in refusing to consider evidence of disparate treatment	41
3. The court of appeals erred in approving the challenge of Frank Samuel	44
C. The Texas Court Of Appeals Failed To Apply The Proper Standard Of Appellate Review	46
CONCLUSION	50
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page(s)

Akins v. *Texas*, 325 U.S. 398 (1945) 25
Alexander v. *Louisiana*, 405 U.S. 625 (1972) 27
Anderson v. *Bessemer City*, 470 U.S. 564 (1985) 40, 47
Arnold v. *North Carolina*, 376 U.S. 773 (1964) 25
Batson v. *Kentucky*, 476 U.S. 79 (1986) ..... *passim*
Beck v. *Alabama*, 447 U.S. 625 (1980) ..... *passim*
Branch v. *State*, No. 6 Div. 93, slip op. (Ala. May 13, 1988) 37
Brooks v. *Tennessee*, 406 U.S. 605 (1972) 16
Brown v. *North Carolina*, *cert. denied*, 107 S. Ct. 423 (1986) 25
Carter v. *Texas*, 177 U.S. 442 (1900) 24
Casteneda v. *Partida*, 430 U.S. 482 (1977) 42
Cassell v. *Texas*, 339 U.S. 282 (1950) 25, 26
Chambers v. *State*, 724 S.W.2d 440 (Tx. Ct. App. 1987) 32, 33
Commonwealth v. *DiMatteo*, 427 N.E.2d 754 (Mass. App. 1981) 34
Commonwealth v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979) 34, 49
Cordova v. *Lynaugh*, 838 F.2d 764 (5th Cir.), *cert. denied*, 56 U.S.L.W 3849 (U.S. June 14, 1988) 16, 21, 22
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 25
Eubanks v. *Louisiana*, 356 U.S. 584 (1958) 25
Ex parte Virginia, 100 U.S. 339 (1880) 24
Gamble v. *State*, 257 Ga. 325, 357 S.E.2d 792 (1987) ... 34-35
Gibson v. *Mississippi*, 162 U.S. 565 (1896) 24
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 7
Hale v. *Kentucky*, 303 U.S. 613 (1938) 24
Hernandez v. *Texas*, 347 U.S. 475 (1954) 25
Hill v. *Texas*, 316 U.S. 400 (1942) 25
Hillman v. *State*, 362 S.E.2d 417 (Ga. App. 1987) 33
Hopper v. *Evans*, 456 U.S. 605 (1982) 10, 11, 16, 22
Inwood Laboratories, Inc. v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982) 47
Johnson v. *State*, 740 S.W.2d 868 (Tx. Ct. App. 1987) ... 33
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977) 16
Martin v. *Texas*, 200 U.S. 316 (1906) 24, 25
Neal v. *Delaware*, 103 U.S. 370 (1881) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Norris v. *Alabama*, 294 U.S. 587 (1935) 24, 27, 47
Patton v. *Mississippi*, 332 U.S. 463 (1947) 25
People v. *Hall*, 672 P.2d 854, 35 Cal. 3d 161, 197 Cal. Rptr. 71 (1983) ..... *passim*
People v. *Moss*, 188 Cal. App. 3d 268, 233 Cal. Rptr. 153 (1986) 40, 49
People v. *Trevino*, 704 P.2d 719 (Cal. 1985) 43
People v. *Wheeler*, 583 P.2d 748 (Cal. 1978) 33, 34, 49
Pierre v. *Louisiana*, 306 U.S. 354 (1939) 25
Reece v. *Georgia*, 350 U.S. 85 (1955) 25
Rogers v. *Alabama*, 192 U.S. 226 (1904) 24
Roman v. *Abrams*, 608 F. Supp. 629 (S.D.N.Y. 1985), *aff'd in part, rev'd in part on other grounds*, 822 F.2d 214 (2d Cir. 1987) 40, 41, 43, 49
Rose v. *Mitchell*, 443 U.S. 545 (1979) 26
Santana v. *State*, 714 S.W.2d 1 (Tex. Crim. App. 1986) . 15
Simmons v. *United States* 390 U.S. 377 (1968) 16
Slappy v. *Florida*, 503 So. 2d 350 (Fla. App. 1987), *aff'd* 522 So. 2d 18 (Fla. 1988), *cert. denied*, 56 U.S.L.W. 3880 (U.S. June 28, 1988) 34, 36-37, 49
Smith v. *State*, 734 S.W.2d 694 (Tx. Ct. App. 1987) 32
Smith v. *Texas*, 311 U.S. 128 (1940) 25
State v. *Gilmore*, 511 A.2d 1150, 103 N.J. 508 (1986) 33, 34, 43
Stevenson v. *United States*, 162 U.S. 313 (1896) 11, 21
Strauder v. *West Virginia*, 100 U.S. 303 (1880) 24, 25
Swain v. *Alabama*, 380 U.S. 202 (1965) 7, 26-27
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 27-28
Thiel v. *Southern Pacific Co.*, 328 U.S. 217 (1946) 26
United States v. *Biaggi*, 673 F. Supp. 96 (E.D.N.Y 1987) 31, 33
United States v. *Lincoln*, 630 F.2d 1313 (8th Cir. 1980) . 16
United States v. *Salvucci*, 448 U.S. 83 (1980) 16
United States v. *U.S. Gypsum Co.*, 333 U.S. 364 (1948) 47
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 26, 42

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (J.A. 56) and its order denying rehearing (J.A. 110) are not yet reported. The findings of the 230th Judicial District Court of Harris County, Texas (the "trial court") following the *Batson* hearing, (J.A. 47) are also unreported.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals, affirming petitioner's conviction of capital murder and his sentence of death, was entered on October 21, 1987. A timely motion for rehearing was denied on November 12, 1987. On January 5, 1988, Justice White extended the time to file a petition for certiorari to and including February 10, 1988. The petition was filed on February 10, 1988, and was granted, without limitation, on May 16, 1988. On June 13, 1988, this Court amended the grant of certiorari and limited the grant to consideration of "Questions 1 and 2 presented by the petition." The jurisdiction of the Court rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. The case also involves sections 6.03, 19.02, 19.03, 19.05, 19.07 of the Texas Penal Code and 37.071 of the Texas Code of Criminal Procedure. The text of these provisions is set forth in the Appendix to this brief.

STATEMENT

A. Course Of Prior Proceedings

Petitioner was indicted for the offense of capital murder on February 12, 1981. The bill of indictment alleged that

petitioner intentionally caused the death of Mary D. Berry while committing or attempting to commit robbery and/or kidnapping, in violation of § 19.03(a)(2) of the Texas Penal Code. J.A. 56. Petitioner was tried by a jury and convicted of capital murder on June 11, 1981. The jury returned affirmative answers to the two special sentencing issues which were submitted to it, and the trial judge assessed petitioner's punishment at death. J.A. 57.

Petitioner filed a timely appeal to the Texas Court of Criminal Appeals. While the appeal was pending this Court decided *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The court of appeals consequently abated the appeal and remanded it to the trial court with instructions to conduct a *Batson* hearing. Following the hearing, the trial court entered findings of fact and conclusions of law on the *Batson* issues (J.A. 44-49), and forwarded those findings to the court of appeals.

The court of appeals thereafter affirmed petitioner's conviction of capital murder and sentence of death and denied a timely motion for rehearing.

B. Material Facts

Mary D. Berry, a 24 year-old pharmacist at the Herman Hospital in Houston, Texas (R. Vol. XVIII at 28)[1] left work at approximately 11:00 p.m. on January 25, 1981. R. Vol. XVIII at 29-30. At 12:30 a.m. a policeman found Ms. Berry's car abandoned at a Houston intersection with its lights on and its engine running. R. Vol. XVIII at 59. The rear bumper of the car had been damaged. R. Vol. XVIII at 73-74.

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[1] Citations to the trial court and Texas Court of Criminal Appeals records are hereinafter cited as "R. Vol. ____ at ____."

At 1:30 a.m. on January 26, 1981, a night clean-up man at the Fondren Southwest Bank in Houston, Texas saw petitioner drive up to the bank in a maroon Chevrolet Monte Carlo automobile, operate the automatic teller machine, and place money from the machine in his pockets. R. Vol. XVIII at 93-99. After petitioner left the bank, the clean-up man retrieved a receipt for $1,000 from the top of the automatic teller machine. R. Vol. XVIII at 100.

The audit tape in the teller machine indicated that Ms. Berry's "Quicksilver" bankcard was used to withdraw $1,000 at 1:30 a.m. on January 26, 1981. R. Vol. XIX at 69-75. A camera attached to the automatic teller machine photographed petitioner using the machine at 1:30 a.m. on January 26. R. Vol. XIX at 65-66. The times of the photographs matched the times on the audit tape when Ms. Berry's card was used to withdraw $1,000 from the machine. R. Vol. XVIII at 129-31, R. Vol. XIX at 64-65.

Ms. Berry's body was discovered on the morning of January 27, 1981. R. Vol. XX at 77, 110-15. Ms. Berry had been bound, gagged and tied to a tree. *Id.* Her ankles had been tied together (R. Vol. XX at 124) with a blue fitted bedsheet and a severed portion of a two-strand electrical cord. R. Vol. XX at 112-13, R. Vol. XXII at 6. Her hands had been tied behind her back and a piece of shirt tied around her neck and connected to her hands. R. Vol. XX at 127. A gag of the same bedsheet material used to tie her ankles had been placed in her mouth and a checkered shirt wrapped over her mouth. R. Vol. XXII at 6-7. The gag did not cover her nose. R. Vol. XXIV at 7, R. Vol. XXII at 30-32.

Other than having been bound and gagged, Ms. Berry had not been physically or sexually abused. R. Vol. XXII

at 9-10, 24. The cause of death was found to be suffocation due to gagging on the cloth gag that had been placed in her mouth. R. Vol. XXII at 26.

Petitioner was arrested on a Virginia warrant in Austin, Texas, on January 28 as he and his girlfriend were walking towards their car (R. Vol. XX at 145-55), a maroon Monte Carlo. R. Vol. XX at 183.

A search of the car produced a brown wallet containing two drivers' licenses, one belonging to the petitioner and one to Ms. Berry. R. Vol. XXII at 72. In the wallet was Ms. Berry's "Quicksilver" bankcard and several credit cards belonging to Ms. Berry. R. Vol. XXII at 73. The search of the automobile also produced a watch and chain identified as Ms. Berry's (R. Vol. XXII at 71) and a purse and calculator, later identified as belonging to Ms. Berry. R. Vol. XXIII at 20-21.

The police also found a tape recorder in the trunk with a power cord that had been severed. R. Vol. XXII at 77. A laboratory analysis matched the severed cord of the tape recorder with the electrical cord that had been used to bind Ms. Berry's ankles. R. Vol. XXII at 136. Petitioner's fingerprints were found on Ms. Berry's "Quicksilver" card. R. Vol. XXII at 159-60.

C. Refusal Of The Trial Court To Instruct The Jury On Lesser Included Offenses

Capital murder requires a finding of intentional killing. A principal thrust of petitioner's defense was that he did not intend to kill Ms. Berry when he left her bound, gagged and tied to a tree.[2] Petitioner did not testify on his

[2] Petitioner's counsel argued that, in order to convict the accused of capital murder, the jury must find "a specific intent to kill." R. Vol. XXIV at 6.

own behalf and presented no evidence in his defense, but his lawyer argued to the jury that it could reasonably infer from the evidence that the petitioner did not intend to kill Ms. Berry when he left her bound and gagged. R. Vol. XXIV at 9-10. Counsel argued that the acts of binding and gagging someone are not consistent with an intent to kill. *Id.*

Consistent with the theory of this defense, petitioner requested that the jury be instructed on the lesser included offenses of involuntary manslaughter and criminally negligent homicide. These noncapital offenses differ from capital murder in that they involve negligent or reckless killing but do not require a finding of intentional killing. The trial court refused to instruct the jury on these lesser included offenses, although it did instruct the jury on the lesser included offense of intentional murder. J.A. 33-40.

On appeal, petitioner argued that the trial court's failure to instruct on lesser included offenses involving unintentional killing violated his due process rights as explained by this Court in *Beck* v. *Alabama*, 477 U.S. 625, 637 (1980). J.A. 87-88. The court of appeals rejected this contention holding that there was no evidence that would support an instruction on the lesser included offenses of involuntary manslaughter and criminally negligent homicide. J.A. 81-83.

The court reasoned that, in order to convict petitioner of criminally negligent homicide, the jury would have been required to find that petitioner failed to perceive the risk of death created by his conduct. The court took the view, however, that petitioner's conduct did not show that he was unaware of the risk of causing death, a risk which it found glaringly obvious. J.A. 86-87. On the other hand,

the court of appeals noted that, in order to convict of involuntary manslaughter, the jury would have been required to find that petitioner was aware of the risk and acted in reckless disregard of it. But, the court said petitioner's conduct did not show that he was reckless because he left enough slack in the deceased's bindings to permit some movement of her shoulders and knees. J.A. 87.

The court of appeals also distinguished *Beck* on the ground that the defendant in that case testified and produced evidence that would have justified a conviction of the lesser offenses, whereas here petitioner did not testify or present any such evidence. J.A. 88.[3]

D. The Use Of Peremptory Challenges To Exclude Black Venirepersons

Petitioner is black. During the voir dire of the jury, the prosecution used its challenges and its peremptory challenges to exclude all thirteen prospective black jurors in the venire. Eight of the black jurors were challenged for cause; five were peremptorily challenged.

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[3] After the jury returned a verdict of guilty, it heard evidence on sentencing. At the sentencing stage of trial, petitioner presented evidence that he came from a broken home, that his mother was not supportive, that he had raised his eight brothers and sisters without a father in his house, and that he helped support and protect his family at a young age. R. Vol. XXV at 95-103. There was also evidence that petitioner was of low intelligence (I.Q. of 80) and has emotional problems stemming from his mother's lack of support. R. Vol. XXVI at 31-36. In his petition for certiorari, petitioner argued that the Texas sentencing procedure did not provide a vehicle for the jury to consider this type of mitigating evidence. This issue was withdrawn from consideration by the Court's order of June 13, 1988, and is no longer within the scope of the grant of certiorari.

At the time of petitioner's trial in 1981, this Court had not decided *Batson*. Nonetheless, relying on the Court's opinion in *Swain* v. *Alabama*, 380 U.S. 202 (1965), petitioner moved to quash the jury, on the ground that the prosecution had systematically used its peremptory challenges to purposefully exclude members of petitioner's race from the jury. R. Vol. I at 124-25. The trial court denied the motion. R. Vol. I at 128.

This Court decided *Batson* while petitioner's case was pending on appeal, and in April 1987 held that *Batson* applied to cases pending on direct review or not yet final when *Batson* was decided. *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). As a consequence, the court of appeals abated petitioner's case to the trial court with instructions to conduct a *Batson* hearing. J.A. 47.

At the *Batson* hearing, the prosecutors testified as to their reasons for exercising the peremptory challenges. At the conclusion of the hearing, the trial court issued findings of fact and conclusions of law with respect to each of the five prospective black jurors who were peremptorily challenged. As to each, the trial court found that "the State's excusal [of the juror] was neutral, relative, clear and legitimate as required by *Batson* and was not racially motivated." J.A. 48-49.

On appeal, petitioner conceded that the State had adequately explained its reasons for challenging two of the five prospective jurors, but he argued that the explanations articulated by the prosecutors for excusing the other three prospective jurors—Leroy Green, Isabella Thomas and Frank Samuel—were insufficient under the standards announced by this Court in *Batson*. The court of appeals rejected petitioner's arguments and upheld the challenges of each of the prospective jurors.

With respect to Mr. Green the court of appeals found "that sole reason given why the venireperson was struck was that he was an employee of the United States Postal Service." J.A. 71. The court noted that it had "difficulty understanding the relevancy of a venireperson's employment as a postman . . . as far as his qualifications for jury service" and that no explanation of the relevance of this fact had been offered by the prosecution. J.A. 71. Nonetheless, the court of appeals accepted the prosecutor's explanation for the challenge as adequate under *Batson*, observing that "[the prosecutor] gave . . . a racially neutral explanation"; that "it is not the office of this Court to judge her credibility," and that "[t]he challenge, after all, is still a peremptory one." J.A. 72.

In the case of prospective juror Thomas, the court of appeals found that the explanation provided by the prosecutor and accepted by the trial court was not supported by the evidence. The prosecutor had explained that he struck Ms. Thomas because he was skeptical about her ability to follow the law on circumstantial evidence which he considered disqualifying since "[circumstantial evidence] was my whole case. We had no direct evidence. . . ." J.A. 68. The court of appeals found this explanation "a little shocking and totally not understandable," and inadequate under *Batson*, because, at the time of the voir dire, the prosecutor's case was not based solely on circumstantial evidence: The prosecutor had a confession from petitioner which was not suppressed until later. J.A. 68-69. Nonetheless, the court of appeals approved the challenge of Ms. Thomas on the ground that that the prosecutor may have struck her because of concern that the petitioner's confession would not completely rule out the relevance of circumstantial evidence or that such evidence might ultimately become relevant. J.A. 69-70.

Finally, the court of appeals approved the challenge of Mr. Samuel on the basis of the prosecutor's explanation that he found that Mr. Samuel's "reading and writing skills were poor" and, "[s]ince the case was complex and was expected to include detailed written jury instructions, the State evidently preferred to avoid literacy problems on the jury." J.A. 70.

SUMMARY OF ARGUMENT

I.

In *Beck* v. *Alabama*, 447 U.S. 625 (1980), this Court held that due process requires that the jury be instructed regarding a lesser included offense in a capital case where there is evidence that would permit a rational juror to convict the defendant of the lesser offense.

In this case, petitioner was charged with capital murder, which required a finding that he killed the deceased "intentionally." The evidence, however, left considerable doubt as to whether petitioner had intended to kill the deceased. As a consequence, petitioner requested that the jury be charged on the lesser included offenses of involuntary manslaughter and criminally negligent homicide, neither of which require a finding of intentional killing. The trial court denied petitioner's request and the court of appeals affirmed.

The court of appeals concluded that *Beck* did not apply for two reasons: First, it found *Beck* to be "factually distinguishable" because "[i]n *Beck* . . . the defendant testified at trial and denied that he killed his victim or intended his victim's death, whereas here [petitioner] did not testify or present any evidence from any source that he possessed only the intent to either rob or kidnap [the deceased]." J.A. 88. But, *Beck* does not require a defend-

ant in a capital case to testify or present evidence in order to obtain instructions regarding lesser included capital offenses; it requires such instructions in every case in which the evidence would support a verdict of guilty of the lesser offense. *See Hopper* v. *Evans*, 456 U.S. 605, 610 (1982). Moreover, to require petitioner to testify in order to be entitled to have the jury charged regarding a lesser included offense would create the impermissible situation of requiring that one constitutional right be surrendered in order to obtain another.

Second, the court of appeals concluded that there was no evidence from which a rational juror could have found the petitioner guilty of either involuntary manslaughter or criminally negligent homicide. The court of appeals concluded that, given the manner in which the deceased was bound and gagged, a jury could not have inferred that petitioner was unaware of the risk created by his conduct, and therefore could not have found petitioner to have been negligent. The court also found that the jury could not have inferred that the defendant acted recklessly, the requisite state of mind for involuntary manslaughter, because the court inferred that petitioner had left some slack in the deceased's bindings.

However, these were not the only inferences that could be drawn from the evidence. The jury could have inferred from all the evidence, including the substantial amount of bedsheet used to gag the deceased and the elaborate and restrictive manner in which she was bound, that petitioner acted in "conscious disregard" of the risk, in which case the jury could have convicted the petitioner of involuntary manslaughter. Alternatively, the jury could have inferred that the petitioner should have been, but was not, aware of the risk that his conduct created and convicted him of criminally negligent homicide.

Where more than one inference can be drawn from the evidence, it is for the jury, and not the court, to determine which inference should be drawn. *Stevenson* v. *United States*, 162 U.S. 313 (1896). *Beck* did not alter this fundamental principle. It requires the jury to be permitted "to consider a verdict of guilt of a noncapital offense *'in every case'* in which 'the evidence would have supported such a verdict.'" *Hopper* v. *Evans*, 456 U.S. at 610. (emphasis added). Because there was evidence in this case from which a rational juror could have convicted the petitioner of either involuntary manslaughter or criminally negligent homicide, *Beck* required the jury to be charged regarding these lesser included offenses.

II.

A.

This Court has long held that discrimination on the basis of race in the selection of jurors is a violation of the Equal Protection Clause. In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Court applied this principle to the use of peremptory challenges and held that, once a defendant establishes a *prima facie* case of racial exclusion through the prosecutor's use of peremptories, the prosecutor must provide a "neutral explanation related to the case to be tried" for each of the contested challenges. *Id.* at 98. In the absence of such an explanation, "[this Court's] precedents require that petitioner's conviction be reversed." *Id.* at 100.

B.

The Texas court of appeals misapplied *Batson* in approving the three contested challenges in this case.

1. In approving the challenge of prospective juror Green, the court of appeals first rejected all of the reasons

that the trial court found were the basis of the prosecutor's challenge and concluded that the "sole reason" Mr. Green was challenged was the fact that he was an employee of the United States Postal Service. This reason was neither supported by the trial court's findings nor consistent with the testimony of the prosecutor and was so dubious that even the court of appeals conceded that it could see no relevance to the supposed explanation. In holding such an explanation adequate under *Batson*, the court of appeals failed to apply the proper legal standard. It thought that Mr. Green's employment as a postal service employee satisfied *Batson* because it was a "racially neutral explanation." However, *Batson* requires that the prosecutor's explanation not only be neutral, but "relate to the case to be tried." In accepting an explanation for the Green challenge that it acknowledged bore no comprehensible relation to the case, the court of appeals eviscerated *Batson* and committed reversible error.

2. The court of appeals justified the challenge of prospective juror Thomas on grounds that were again inconsistent with the trial court's findings and the prosecutor's own testimony. The prosecutor testified that he challenged Ms. Thomas because his case depended *entirely* on circumstantial evidence and he was skeptical of Ms. Thomas' ability to apply the law of circumstantial evidence. The court of appeals found that, contrary to the prosecutor's testimony, his case was not dependent "entirely, if at all," on circumstantial evidence, because at the time of the challenge he had petitioner's confession which had not then been suppressed. Thus, the court of appeals found the prosecutor's explanation "a little shocking" and "totally not understandable" and concluded that no rational fact-finder could have accepted the explanation as plausible. The court of appeals nonetheless

approved the challenge, speculating that, although he had the confession, the confession did not totally rule out the law of circumstantial evidence, hence the prosecutor *may* have been concerned that circumstantial evidence *might* become relevant and struck Ms. Thomas "rather than risk a hung jury." This supposed motivation was neither advanced by the prosecutor nor found by the trial court.

In approving the Thomas challenge, the court of appeals completely ignored the purpose of the *Batson* inquiry. That inquiry is to examine the explanation provided by the prosecutor to determine if it is legitimate or pretextual. If the explanation proffered by the prosecutor is not found plausible, it must be rejected. That justifications other than the prosecutor's would have been supportable if they had been the reason for the challenge is irrelevant.

3. The court of appeals concluded that prospective juror Samuel was struck because his "reading and writing skills were poor" and "the State evidently preferred to avoid literacy problems on the jury." Although the State came closer to satisfying *Batson* in explaining this challenge, its explanation is not supported by the record. During the voir dire the prosecutor sought to confirm his suspicion that Mr. Samuel was illiterate by asking him to read the first two statutory sentencing questions. Samuel read these questions without difficulty, demonstrating an ability to read at an advanced level.

C.

If *Batson* is to have meaning, appellate courts must conduct a careful and sensitive review of *Batson* findings made by the trial court, and must reject those findings where they do not satisfy *Batson's* standards or are flatly contradicted by objective facts in the record. The inquiry

that *Batson* requires was intended to ensure that defendants' constitutional rights would be protected against subversion by the discriminatory use of peremptory challenges. It was meant to end the immunity of peremptory challenges from constitutional scrutiny.

In this case, the court of appeals failed to conduct the appropriate scrutiny. It rejected virtually all of the findings of the trial court as implausible, yet approved the contested challenges on grounds not advanced by the prosecutor and, in one instance, having no relevance whatsoever to this case. If appellate courts are permitted to ignore *Batson's* requirements in this manner, the promise of *Batson* will be illusory and prosecutors will have a license to violate the Constitution by inventing pretexts that lack even logical plausibility.

ARGUMENT

I. THE DECISION BELOW VIOLATED THIS COURT'S HOLDING IN *BECK* V. *ALABAMA*

This Court held in *Beck* v. *Alabama* that due process requires the jury to be instructed regarding a lesser included offense in a capital case where the evidence would permit the jury rationally to convict the defendant of the lesser offense. 447 U.S. 625, 645 (1980). The Court grounded its holding on the need for reliability in the fact finding process, noting that "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637.

The evidence in the instant case strongly suggested that petitioner had killed the deceased but left considerable doubt regarding whether he intended to kill her. Petitioner requested that the jury be charged regarding the lesser included offenses of involuntary manslaughter and criminally negligent homicide, neither of which require a finding of intent to kill. The trial court denied petitioner's request and charged the jury only as to capital murder and intentional murder. By so doing, the court denied the jury the option of convicting petitioner of unintentional homicide, even if the jury concluded factually that that was the actual nature of his crime.

Petitioner argued on appeal that *Beck* required the jury to be charged regarding the lesser included offenses of involuntary manslaughter and criminally negligent homicide because the jury could have rationally acquitted him of capital murder and convicted him of one of those offenses. The court of appeals found *Beck* to be "factually distinguishable" because "[i]n Beck . . . the defendant testified at trial and denied that he killed his victim or intended his victim's death, whereas here appellant did not testify or present any evidence from any source that he possessed only the intent to either rob or kidnap [the deceased]." J.A. 88.[4] The court also parsed the record and found in effect that the petitioner's conduct was either too reckless to be negligent or too negligent to be reckless.

The ground of decision based upon the petitioner's failure to testify or present evidence demands little dis-

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[4] The court of appeals cited *Santana* v. *State*, 714 S.W.2d 1 (Tex. Crim. App. 1986), in which it also found *Beck* to be distinguishable because, unlike the appellant in *Santana*, "Beck testified at trial and denied that he killed the victim or intended the victim's death." *Id.* at 9.

cussion. The court of appeals plainly erred in holding that *Beck* did not compel the requested lesser included offense instructions because petitioner had not testified or presented evidence. *Beck* does not require a defendant in a capital case to testify or to present evidence in order to obtain instructions to the jury regarding a lesser included noncapital offense, it requires such instructions "*in every case* in which the evidence would have supported" a verdict of guilty of the lesser offense. *Hopper* v. *Evans*, 456 U.S. 605, 610 (1982) (emphasis added).[5] To say that an accused must testify or must present evidence regarding his intent, in order to receive a jury charge necessary for the fair and reliable determination whether he is guilty of a capital offense or only of a lesser crime supported by the prosecution's case-in chief, would create the "intolerable" result that "one constitutional right . . . be surrendered in order to assert another." *Simmons* v. *United States*, 390 U.S. 377, 394 (1968). *Accord United States* v. *Salvucci*, 448 U.S. 83, 89-90 (1980); *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806-07 (1977); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-13 (1972). Consequently, petitioner was entitled to instructions on the lesser included offenses of involuntary manslaughter and criminally negligent homicide if the evidence from any source would have supported a verdict of guilty of those offenses.

The evidence here established that a strip of bedsheet was stuffed deep into the deceased's mouth and that another strip of bedsheet was tied around her mouth. The deceased's hands were tied behind her back and connected

[5] The federal courts of appeal have applied *Beck* notwithstanding the lack of any testimony or evidence presented by the defendant. *See, e.g., Cordova* v. *Lynaugh*, 838 F.2d 764 (5th Cir.), *cert. denied*, 56 U.S.L.W. 3849 (U.S. June 14, 1988); *United States* v. *Lincoln*, 630 F.2d 1313, 1318 n.1, 1320-21 (8th Cir. 1980).

to a piece of shirt tied around her neck. The deceased's feet were tied together with a bedsheet and electrical cord, and the deceased was also tied to a tree. The evidence suggested that the deceased was tightly bound and gagged but that sufficient slack existed "to allow[] some movement of [her] knees and shoulders." J.A. 83.

This evidence would support a verdict of guilty of involuntary manslaughter. Texas defines involuntary manslaughter as "recklessly caus[ing] the death of an individual." Tex. Penal Code Ann. § 19.05(a)(1). "A person acts recklessly . . . with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id.*, § 6.03(c). The jury could reasonably have inferred from the evidence regarding the way in which the deceased was gagged and bound that petitioner had created a substantial and unjustifiable risk that she would die and that petitioner was aware of but consciously disregarded that risk.

The evidence before the jury would also have supported a verdict of guilty of criminally negligent homicide. Texas law defines criminally negligent homicide as "caus[ing] the death of an individual by criminal negligence." Tex. Penal Code Ann. § 19.07. "A person acts with criminal negligence . . . with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id.*, § 6.03(d). The risk must be of such a nature and degree that "the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id.*, § 6.03(d). The jury could

reasonably have inferred from the evidence regarding the manner in which the deceased was gagged and bound that petitioner had created a substantial and unjustifiable risk of her death, that petitioner ought to have been but was not aware of that risk, and that petitioner's failure to perceive that risk grossly deviated from the standard of care that an ordinary person would have exercised under the circumstances.

The court of appeals thought that the manner in which petitioner had gagged and bound the deceased precluded the jury from inferring that he had been unaware of the risk his conduct created. "We cannot conclude from the evidence that was presented that one might infer therefrom that when appellant gagged, tied his victim's hands tightly behind her back, tied a piece of shirt around her neck which was connected to her hands, tied her feet together with a bed sheet and an electrical cord, with the entire system of knots and materials tied very tight, that he was then unaware of the risk his conduct created." J.A. 85-86. Consequently, the court of appeals concluded that the jury could not have inferred that petitioner was unaware of the risk he had created and could not have convicted him of criminally negligent homicide. J.A. 86.

But the court of appeals then reversed its field in order to find that the jury also could not have inferred that petitioner was reckless. Any inference of recklessness was said to be negated by evidence that petitioner "left enough slack" in the deceased's bindings to permit some movement of her shoulders and knees. J.A. 87. That evidence, the court concluded, "reflects that [petitioner] was not 'reckless' as the term is defined," and therefore precluded a conviction of involuntary manslaughter. J.A. 87.

There are several flaws in this reasoning. To begin with, the evidence established only that there was slack in the

deceased's bindings, not that petitioner left the slack. The inference that he did so, while reasonable, is not the only reasonable inference that could be drawn from the evidence. For example, the jury could have inferred that the slack had been created by the deceased's movements rather than by petitioner. Had the jury so inferred, it might not have concluded, as did the court of appeals, that petitioner "was not 'reckless' as the term is defined." J.A. 87. Furthermore, even if the jury had inferred that petitioner left the slack, it could still have concluded that he acted recklessly by stuffing large amounts of bedsheet deep into the deceased's mouth, gagging her, and tightly fastening her hands and feet so that she was unable to loosen the gag.

In any event, the court of appeals did not explain why the jury would have been precluded from finding petitioner to have acted recklessly if it inferred that he left some slack in the deceased's bindings. However, its logic seems to be that an inference that petitioner left some slack in the bindings would preclude the jury from concluding that petitioner was aware of the risk he had created. But that logic directly contradicts the court's earlier conclusion that the jury could not have found petitioner guilty of criminal negligence because it was required to infer that petitioner was aware of the risk he had created. J.A. 87-88.[6] Only one of these conclusions can stand.

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[6] This contradiction was noted by the dissent:

> First the majority says appellant's conduct precludes an inference "that he was then unaware of the risk his conduct created," and speculation that he did not intend the result "does not change his *awareness or perception* of the risk his conduct created." Slip opinion at 23. So much for criminally negligent homicide. Next it says, "[w]ithout evidence that appellant acted recklessly in causing the death of ~~his victim~~ [involuntary manslaughter was not raised]." *Id.*, at 24. But the majority had just found [petitioner] *was* aware of the risk.

J.A. 103 n.1 (emphasis in original).

Either the jury was required to infer that petitioner was aware of the risk that his conduct created, as the court found in discussing criminal negligence, or it was required to infer that he was unaware of that risk, as the court appears to have assumed in discussing recklessness. If the jury was required to infer that petitioner was aware of the risk that his conduct created, then the jury could reasonably have concluded that he recklessly killed the deceased, and convicted him of involuntary manslaughter. If, on the other hand, the jury was required to infer that petitioner was unaware of the risk that his conduct created, then the jury could reasonably have inferred that he negligently killed the deceased, and convicted him of criminally negligent homicide. In either case, the evidence would support a verdict of guilty of a lesser included noncaptial offense, and *Beck* required that the jury be instructed regarding that offense.

It is also possible that the court of appeals viewed the evidence that petitioner left slack as establishing that petitioner did not "conscious[ly] disregard" the risk his conduct created. While the jury could have inferred that petitioner had not "conscious[ly] disregard[ed]" the risk because he left slack in the deceased's bindings, that inference was not compelled.[7] The jury could instead have inferred that petitioner *inadvertently* left the slack, and that the slack therefore had no bearing upon whether or not petitioner acted in "conscious disregard" of the risk he created. Alternatively, even if the jury concluded that the slack was intentional, it might nevertheless have inferred from all the evidence, including the substantial amount of bedsheet used to gag the deceased and the elaborate and

[7] A far more likely inference from this evidence was that petitioner did not intend to kill the deceased.

restrictive manner in which she was bound, that petitioner had acted in "conscious disregard" of the risk he had created. In either case, the jury could reasonably have concluded that petitioner had been reckless and convicted him of involuntary manslaughter.

Where more than one inference can be drawn from the evidence, it is for the jury, and not the court, to determine which inference should be drawn. "The evidence as to [the lesser included offense] need not be uncontradicted or in any way conclusive" before the jury should be charged regarding that offense. *Stevenson* v. *United States*, 162 U.S. 313, 315 (1896). "So long as there was some evidence" relevant to the lesser included offense, "the credibility and force of such evidence must be for the jury, and cannot be [a] matter of law for the decision of the court." *Id.* The lesser included offense must be charged "[i]f there were *any* evidence which tended to show such a state of facts as might bring the crime within" that offense, for it "then became a proper question for the jury to say whether the evidence were true." *Id.* (emphasis added).

Beck embodies this fundamental principle. *See, e.g.*, *Cordova* v. *Lynaugh*, 838 F.2d at 769. *Cordova* makes clear that *Beck* required petitioner's jury to be given the opportunity to consider whether he was guilty of the lesser included offenses of involuntary manslaughter or criminally negligent homicide. Like petitioner's case, *Cordova* arose from the refusal of a Texas court to charge the jury regarding lesser included offenses in a capital murder prosecution. The Texas Court of Criminal Appeals affirmed the lower court's refusal to charge the jury regarding murder and aggravated assault on the grounds that "[t]here is no evidence in the record that [Cordova] was guilty of only a lesser included offense."

Cordova v. *State*, 698 S.W.2d 107, 113 (Tex. Crim. App. 1985).

The United States Court of Appeals for the Fifth Circuit disagreed. It found that *Beck* required the lesser included offense of murder to be charged if "a rational jury could have found that Cordova murdered [the deceased] but that it was not in the course of the robbery." *Cordova*, 838 F.2d at 769. The Fifth Circuit agreed with the Texas court of appeals that "the jury could infer that Cordova had a prior agreement to rob the deceased" and could thus have found that he had participated in the robbery as a "party" under Texas law. *Id.* at 796. It noted, however, that the "jury could reject that inference . . . [and] conclude that Cordova did not have a prior agreement to rob [the deceased]." *Id.* In other words, "the evidence would support the jury in finding either that Cordova planned the robbery of [the deceased] or that he did not so plan." *Id.* at 770. Since the "evidence would have supported [a] verdict [of guilty of non-capital murder]," and since the jury was not charged regarding that offense, "Cordova's due process rights were violated." *Id.*, *quoting Hopper* v. *Evans*, 456 U.S. at 610.

Petitioner's due process rights were likewise violated by the trial court's failure to charge the requested lesser included offenses. The jury could have reasonably inferred from the evidence either that petitioner was reckless or that he was not. The jury could also reasonably have inferred from that evidence either that petitioner was criminally negligent or that he was not. Under these circumstances, *Beck* required the jury to be charged regarding the lesser included offenses of involuntary manslaughter and criminally negligent homicide so that it could determine which of those inferences was correct.

The trial court's charge regarding intentional (non-capital) murder did not relieve it of its obligation under *Beck* to charge the jury regarding lesser included offenses that it could have found from the evidence. The evidence would have permitted the jury rationally to have convicted petitioner of those offenses. *Beck* was grounded upon this Court's concern for the "reliability of the guilt determination" in capital cases. *Beck*, 447 U.S. at 638. That concern is not satisfied simply by giving the jury a means to compromise between acquittal and conviction of a capital offense. What is required is that the jury be given an opportunity to reflect in its verdict any findings that it could rationally make from the evidence before it. Here, the only lesser included offense charged—intentional murder—did not give the jury the option of convicting petitioner of an unintentional killing if it found factually, as defense counsel had argued vigorously in closing, that the evidence left substantial doubt regarding petitioner's intent to kill the deceased. Denying this option deprived petitioner of the reliable fact-finding process commanded by *Beck*.

II. THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISION IN *BATSON* V. *KENTUCKY*

In his concurrence in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), Justice White observed that "much litigation will be required to spell out the contours of the Court's Equal Protection holding today." *Batson*, 476 U.S. at 102. The present case calls upon the court to spell out the basic principle that pretextual explanations by prosecutors and their uncritical acceptance by state courts do not satisfy *Batson*. If the approach to reviewing *Batson* manifested by the court below is accepted as adequate, *Batson* will have no meaning and the Equal Protection scrutiny it promises will be illusory.

After petitioner established a *prima facie* case that his prosecutors had excluded prospective jurors on the basis of race, the prosecutors testified to their reasons for peremptorily challenging five prospective black jurors. The trial court found that the prosecutors' explanations were adequate. The court of appeals agreed, albeit for different reasons than the trial court.

In one instance, the court of appeals accepted as an adequate explanation the fact that the prospective juror was a postal service employee, while conceding that that fact bore no relevance to the juror's fitness to serve, either in general or in particular. In another instance, the court of appeals rejected as implausible the explanation offered by the prosecutor, but approved the challenge on the basis of an alternative explanation conjectured by the court and never advanced by the prosecutor. Further, it approved explanations plainly not supported by the record.

A. *Batson* Requires That Prosecutors Explain The Basis For Exercising Peremptory Challenges Once The Defendant Establishes A *Prima Facie* Case Of Racial Exclusion

For more than a century this Court has recognized that forcing a defendant to go to trial before a jury from which members of his race have been purposefully excluded is a denial of equal protection. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880).

This principle has repeatedly and consistently been applied by this Court. *See Ex parte Virginia*, 100 U.S. 339 (1880); *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Gibson* v. *Mississippi*, 162 U.S. 565 (1896); *Carter* v. *Texas*, 177 U.S. 442 (1900); *Rogers* v. *Alabama*, 192 U.S. 226 (1904); *Martin* v. *Texas*, 200 U.S. 316 (1906); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hale* v. *Kentucky*, 303 U.S. 613

(1938); *Pierre* v. *Louisiana*, 306 U.S. 354 (1939); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Hill* v. *Texas*, 316 U.S. 400 (1942); *Akins* v. *Texas*, 325 U.S. 398 (1945); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Cassell* v. *Texas*, 339 U.S. 282 (1950); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Eubanks* v. *Louisiana*, 365 U.S. 584 (1958); *Arnold* v. *North Carolina*, 376 U.S. 773 (1964).

The Court's refusal to permit racial discrimination to play any role in the selection of a jury rests on "this Nation's profound commitment to the ideal of racial equality," *Brown* v. *North Carolina*, *cert. denied*, 107 S. Ct. 423, 424 (1986) (J. O'Connor, concurring), and on the defendant's fundamental right to trial by jury. Discrimination in the selection of juries "denies to [a defendant] the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86. "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal *status* in society as that which he holds." *Strauder*, 100 U.S. at 308 (emphasis in original). "For a jury to perform its intended function as a check on official power, it must be drawn from the community." *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). Discriminatory selection procedures would make "juries ready weapons for officials to oppress . . . minorities." *Akins*, 325 U.S. at 408 (J. Murphy, dissenting).

While a defendant has no right to a jury composed in whole or in part of persons of his own race, *Strauder*, 100 U.S. at 305, he does have "the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria." *Martin* v. *Texas*, 200 U.S. at 320-21. Implicit in this requirement is the principle that

"[j]urymen should be selected as individuals, on the basis of individual qualification, and not as members of a race." *Cassell* v. *Texas*, 339 U.S. 282, 286 (1950). The Court's decisions in this area recognize, therefore, that "[a] person's race simply 'is unrelated to his fitness as a juror.'" *Batson* 476 U.S. at 87, *quoting Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (J. Frankfurter, dissenting).

In recent years the Court has revisited these premises in the context of the question whether racially discriminatory jury selection can be excused as harmless error. In these cases, the Court has reaffirmed that discrimination on the basis of race in the selection of jurors "strikes at the fundamental values of our judicial system and our society as a whole" and denies the defendant's right to equal protection of the laws. *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979). The Court has forcefully reiterated that "intentional discrimination in the selection of . . . jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent." *Vasquez* v. *Hillery*, 474 U.S. 254, 262 (1986). It "is not amenable to harmless-error review," because "discrimination in the . . . [selection of the] jury undermines the structural integrity of the criminal tribunal itself." *Id.* at 263-64. "The overriding imperative to eliminate this systematic flaw . . . requires [this Court's] continued adherence to a rule of mandatory reversal." *Id.* at 264.

In *Swain* v. *Alabama*, 380 U.S. 202 (1965), the Court recognized that peremptory challenges could violate these principles, and acknowledged that the systematic prosecutorial use of peremptory challenges to exclude persons from juries because of their race would implicate the Equal Protection Clause. *Id.* at 221-22. The Court

declined, however, to scrutinize the prosecutor's use of peremptory challenges in any particular case. *Id.* at 222.

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Court overruled this latter aspect of *Swain* on finding that, as interpreted, *Swain* had created a "mission impossible" for defendants and had rendered "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." *Id.* at 92-93.

Batson announced that once a defendant established a *prima facie* showing of discrimination, the State must explain its bases for peremptorily challenging prospective black jurors. *Id.* Although the Court "emphasize[d] that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause," *id.* at 97, it made clear that the "prosecutor [could not] rebut the defendant's *[prima facie]* case merely by denying that he had a discriminatory motive or [simply by] 'affirm[ing] [his] good faith in making individual selections.'" *Id.* at 98, *quoting Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972). The Court reasoned that "[i]f these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be a vain and illusory requirement.'" *Batson*, 476 U.S. at 98, *quoting Norris* v. *Alabama*, 294 U.S. at 598.

As a consequence, *Batson* held that in order to rebut a defendant's *prima facie* case, the prosecutor must "articulate a neutral explanation [for the peremptory challenge] *related to the particular case to be tried.*" *Batson*, 476 U.S. at 98 (emphasis added). Such an explanation, the Court held, must be "'clear and reasonably specific' and constitute 'legitimate reasons' for exercising the [prosecutor's] challenges." *Id.* at 98 n.20, *quoting Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 258

(1981).[8] "If the . . . prosecutor does not come forward with a neutral explanation for his action, [the Court's] precedents require that petitioner's conviction be reversed." *Batson*, 476 U.S. at 100.

In this case, the defendant established a *prima facie* case and the prosecutors explained the basis for their challenge of black jurors. The question presented is whether those explanations and the court of appeals' review of them were adequate under *Batson*.

B. The Court of Appeals Misapplied Batson

The trial court found that petitioner had established a *prima facie* case of discrimination under *Batson*. J.A. 62. That finding was not challenged on appeal. J.A. 63. Under *Batson*, once a *prima facie* case of discrimination has been made, the prosecution must provide a sufficient explanation for its peremptory challenges to each black juror.

There were five such challenges here. With respect to two, petitioner conceded that the prosecutor's explanations were adequate, and he did not contest these challenges on appeal.[9] Petitioner's appeal focused on the remaining three black jurors who were peremptorily struck: Leroy Green, Isabella Thomas, and Frank Samuel.

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[8] *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) is a Title VII case. *Batson* directed courts and litigants to Title VII cases for guidance in pursuing *Batson's* inquiry into discriminatory intent. *See, e.g., Batson*, 476 U.S. at 94, n.18; 96, n.19; and 98, nn.20, 21.

[9] These two jurors "were struck because of their general opposition to the death penalty." J.A. 67.

1. The Texas court misapplied *Batson* in approving the peremptory challenge of Leroy Green[10]

The court of appeals found that "the sole reason . . . [Leroy Green] was struck was that he was an employee of the United States Postal Service." J.A. 71. Although the court expressed "grave concern" about this challenge and conceded that it had "difficulty understanding the relevancy of a venireperson's employment as a postman . . . as far as his qualifications for jury service" (J.A. 71), it nonetheless approved the challenge because: (1) the prosecutor's explanation for the challenge, *i.e.*, Mr. Green's employment as a postal worker, was "a racially neutral explanation"; (2) "it is not the office of this Court to judge [the prosecutor's] credibility"; and (3) "[t]he challenge, after all, is still a peremptory one." J.A. 72.

The court's conclusion cannot be squared with *Batson*.

First, the "racially neutral explanation" on which the court of appeals relied is not supported by any finding of the trial court. To the contrary, while accepting a variety of other explanations for striking Mr. Green[11] (J.A. 72), the trial court did *not* find that Mr. Green's occupation as a postal service employee was the basis for the prosecutor's decision to challenge him. The inference is that the trial court gave little or no weight to her professed concerns

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[10] The voir dire or Mr. Green appears at R. Vol. XVI at 95-127.

[11] The court of appeals concluded that none of the explanations found by the trial court were supported by the record. It rejected them (J.A. 72), concluding that Mr. Green's "answers to questions asked did not indicate an inability on his part, that was any greater or less than the unchallenged venirepersons, to understand the law or to apply it impartially" (J.A. 71), and that Mr. Green "did not indicate a bias or prejudice against any phase of the law pertinent to this case." *Id.*

about Mr. Green's occupation, which were equivocal at best. *See* n.12 *infra*.

Second, the court of appeal's justification for sustaining this challenge is contradicted by the prosecutor's own testimony. The court of appeals found that the "*sole* reason . . . Mr. Green was struck was that he was an employee of the . . . Postal Service," (J.A. 71), but the prosecutor expressly testified to the contrary. She stated that, while a juror's employment by the Postal Service was "kind of an alert to me," Batson Tr. at 209, "[i]t makes a difference *only if there are other factors I am uncomfortable with.*" *Id.* at 216 (emphasis added).[12]

The court of appeals thus had no record support for translating the prosecutor's professed concern about Mr. Green's occupation into an independent and sufficient explanation for the challenge. The prosecutor offered a litany of reasons for challenging Mr. Green, but none were accepted by the court of appeals as at all plausible except her concern about Mr. Green's occupation. If that was indeed the "sole reason" for her challenge, her invention of the others was an exceedingly suspicious circumstance, establishing doubt, rather than confidence, in her purported racial neutrality.

Third, Mr. Green's occupation bore no rational relationship to his fitness to serve as a juror in general or in this case. There is no real or apparent attribute of postal workers as a group that might be relevant to the issues in

[12] *See also* Batson Tr. at 214. (emphasis added).

Q. And . . . you haven't had good luck with postal workers?

A. Sometimes I have, but I am alert if there are other things about the person I am concerned about, that *together with the fact they are postal workers, gives me some cause for concern.*

Mr. Tompkins' prosecution. Nor was there any relationship, apparent or explained, between Mr. Green's occupation and the parties, the witnesses, the victim, or the lawyers. In short, the fact that Mr. Green was a postal worker was wholly irrelevant in measuring his fitness for service as a juror.[13]

Indeed, Mr. Green's employment as a postal worker constituted such a dubious explanation for the challenge that even the court of appeals had to admit that it could not discern any logical relationship between that fact and Mr. Green's fitness to serve as a juror. Nor did the court demand that the reason for the challenge make any sense and noted that "the State [had not] undertaken to enlighten [the court]" (J.A. 72) as to how Mr. Green's employment was relevant in any way to his service as a juror. It simply accepted at face value an explanation that it acknowledged to have no discernable logical basis.

[13] Petitioner does not argue, of course, that a person's occupation may never be a legitimate reason for exercising a peremptory challenge. For example, *United States* v. *Biaggi*, 673 F. Supp. 96 (E.D.N.Y. 1987), also involved a peremptory challenge which was explained on the basis of the juror's employment with the postal service. In *Biaggi*, however, the prospective juror's occupation was relevant in the context of that case. "[H]e [the juror] had been employed in the Post Office, which might have led him to sympathize with Mr. Biaggi, himself a one time postal worker and public advocate of civil servants' causes." *Id.* at 105. (Similarly, the prosecutor explained his challenge of a retired police officer on the grounds that "he had been in the police department about the same time as Mr. Biaggi, and Mr. Biaggi's wide reknown [sic] and extraordinary prestige as a police officer, and his past executive office in the Patrolmen's Benevolent Association, suggested to the prosecution that [the juror] would sympathize with the defendant." *Id.*) In petitioner's prosecution, however, there was no such relationship between Mr. Green's occupation and any aspect of the case.

a. *Batson* requires that the prosecutor's explanation be relevant as well as facially neutral.

In accepting the prosecutor's explanation as adequate under *Batson*, while conceding that Mr. Green's occupation was not relevant to his fitness to serve as a juror, the Texas court failed to apply the proper legal standard. *Batson* expressly requires that the prosecutor's explanation for a peremptory challenge satisfy a two-part test: it must be "neutral" and "related to the particular case to be tried." *Batson*, 476 U.S. at 98. The court of appeals here cited the first part of the test but ignored the second. Mr. Green's occupation as a postal service employee was a "racially neutral" reason that, as the court of appeals itself acknowledged, bore no inherent, explained, or even ostensible relation to the case to be tried. By failing to apply the second part of the *Batson* test, the Texas court committed reversible error.

Both parts of *Batson's* two-part test are essential; if either part is missing, the test becomes meaningless. A facially neutral explanation which is unrelated to the case to be tried, is no explanation at all. Any peremptory challenge can be adequately explained away if an explanation that is racially neutral in the abstract is all that is required. A prosecutor bent on discrimination can justify any challenge simply by picking some non-racial characteristic of the prospective juror and articulating that as the reason for the challenge, without regard to its logic or bearing on the prospective juror's fitness to serve, in general, or in the case at hand.[14]

[14] There is a broad range of facially neutral explanations which, if relevant, could rebut the defendant's *prima facie* case. *See, e.g., Chambers* v. *State*, 724 S.W.2d 440, 442 (Tx. Ct. App. 1987) (juror's age); *Smith* v. *State*, 734 S.W.2d 694, 698 (Tx. Ct. App. 1987) (juror's occupation); *Johnson* v. *State*, 740 S.W.2d 868, 870-71 (Tx. Ct. App. 1987) (juror's marital status); *Chambers*, 724 S.W.2d at 442 (juror's religious persuasion); *United States* v. *Biaggi*, 673 F. Supp. 96, 105 (E.D.N.Y. 1987) (juror's attire); and *Hillman* v. *State*, 362 S.E.2d 417, 418 (Ga. App. 1987) (juror's facial and cranial hair). With no requirement that the neutral reason be relevant to the juror's fitness to serve, in general or in the case at hand, virtually any of these explanations could easily form the basis for a pretextual challenge.

Batson's requirement that the prosecutor's explanation relate to the case to be tried was intended to serve as a safeguard against prosecutors using racially neutral explanations as a pretext for discrimination by ensuring that there be some logic apparent in the reason articulated. After all, as *Batson* noted, peremptory challenges by their nature lend themselves to discriminatory use. *Batson*, 476 U.S. at 94-95. *Batson's* requirement that prosecutors explain the basis for peremptory challenges in those limited instances in which defendants have established a *prima facie* case of discrimination was based on the Court's refusal "to attribute to chance the absence of black citizens on a . . . jury . . . where the selection mechanism is subject to abuse." *Id.* at 95. In such cases, the Court felt compelled to require prosecutors to explain the basis for exercising the peremptory challenge in order to determine whether the use of the challenge has been "legitimate," *id.* at 98, n.20, or a pretext for discrimination.[15]

[15] The California Supreme Court has defined the court's role in this context as "satisfy[ing] itself that the [prosecutor's] explanation is genuine." *People* v. *Hall*, 672 P.2d 854, 858, 197 Cal. Rptr. 71, 35 Cal. 3d 161 (1983) (emphasis in original). *Accord State* v. *Gilmore*, 511 A.2d 1150, 1165 (N.J. 1986) ("The trial court must decide whether these [the prosecutor's explanations] are . . . genuine and reasonable grounds . . . [or] 'sham excuses belatedly contrived . . .'"), *quoting People* v. *Wheeler*, 583 P.2d 748, 765 (Cal. 1978).

For these reasons, state courts that make meaningful *Batson-type* inquiries have recognized the need to find some degree of relevance between a facially neutral reason articulated by the prosecutor and the fitness of the juror to serve. In California, for example, "the prosecutor must satisfy the court that he exercised such peremptories on grounds that were *reasonably relevant* to the particular case on trial or its parties or witnesses—*i.e.*, the reasons for specific bias." *People* v. *Wheeler*, 583 P.2d 748, 765 (Cal. 1978) (emphasis added). In Massachusetts, prosecutors must demonstrate that the "juror's . . . unique relationship to the particular case raises the specter of individual bias. *Commonwealth* v. *Soares*, 387 N.E.2d 499, 514 (Mass.), *cert. denied*, 444 U.S. 881 (1979). Florida recognizes that *Batson* requires that the prosecutor's explanation provide some basis for concluding that there is a relationship between the reason articulated for the challenge and the ability of the juror to serve competently or impartially in the case at hand. *See, e.g., Slappy* v. *Florida*, 503 So. 2d 350, 355 (Fla. App. 1987), *aff'd*, 522 So. 2d 18 (Fla. 1988) (where the court rejected a prosecutor's justification for excluding a schoolteacher based on the prosecutor's belief that the schoolteachers were liberal because the prosecutor did not explain how liberalism could "affect an ability to follow the law in a concealed firearm case"); *see also Commonwealth* v. *DiMatteo*, 427 N.E.2d 754, 757 (Mass. App. 1981) (disapproving of a challenge on the grounds that "widowhood [is] a tenuous indicator of bias in connection with the crime of armed robbery of a gas station"); *State* v. *Gilmore*, 511 A.2d at 1168 (rejecting a challenge based on an asserted lack of high intelligence because there was "no reasonable relevancy between the issues to be resolved by the jury and the high intellectual achievement of jurors"); and *Gamble* v. *State*, 257 Ga. 325, 328, 357 S.E.2d 792, 795-96 (1987) (rejecting the exclusion of a potential juror because he is a Mason, where "it is not clear how Masonic membership is related to this case.").

These courts and this Court in *Batson* have recognized that, in order for the pretextual analysis required by *Batson* to be meaningful, the inquiry cannot stop at facial neutrality. There must be some discernible relationship between the neutral reason articulated and the juror's fitness to serve as a juror, in general, or in the "case to be tried." This relationship can be apparent or it can be explained by the prosecutor. But, it must be present.

The court of appeals could discern no such relationship here and the prosecutor did not provide one. "[S]he did not elaborate upon her evident bias against such employees . . . nor has [she] undertaken to enlighten us . . . on the subject." J.A. 72. In approving the Green challenge, while conceding that there was no relevancy between Mr. Green's occupation and his qualification for jury service, the court of appeals ignored *Batson's* requirement.

b. Failure to apply *Batson* cannot be excused on grounds of witness credibility.

The court of appeals sought to justify its failure to apply the second part of the *Batson* test by asserting that it was bound to accept the prosecutor's neutral explanation as adequate on grounds of witness credibility: "it is not the office of this Court to judge her credibility." J.A. 72. This statement reflects a fundamental misunderstanding of the nature of the inquiry required by *Batson*. *Batson* stands for the proposition that a defendant's *prima facia* case cannot be rebutted by an unspecified or unexamined explanation on the part of the prosecutor, simply because of judicial reluctance to call the prosecutor a liar. *Batson*, 476 U.S. at 96-97.

This is the plain implication of *Batson's* explicit statement that a simple denial of discriminatory motives is insufficient to meet the Constitution's requirements. *Id.* It is the obligation of trial courts and of appellate courts to test the prosecutor's explanation to determine if it is pretextual or genuine. Here, the court of appeals abdicated that responsibility by turning the concept of credibility on its head.

Credibility is a necessary but not sufficient condition of an explanation that can be accepted as satisfying *Batson*. The court must first satisfy itself that the explanation articulated is a sufficiently plausible reason to meet *Batson's* two-part test. Only then does the credibility of the prosecutor become relevant. In other words, *Batson*, requires a court to evaluate "both the credibility of the person offering the explanation *as well as the credibility of the asserted reasons.*" *See Florida* v. *Slappy*, 522 So. 2d at 22 (Fla.), *cert. denied*, 56 U.S.L.W. 3880 (U.S. June 28, 1988) (emphasis added).[16]

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[16] Moreover, there was no basis for the court of appeals to defer to the trial court on grounds of credibility in this instance. The court of appeals apparently proceeded on the mistaken notion that the trial court had made a credibility finding on this issue. But, as noted above, the trial court did *not* find that Mr. Green's employment as a postal worker was the reason the prosecutor decided to challenge him. J.A. 72. Thus, there was no credibility finding to which the court of appeals owed deference. Indeed, if there was a credibility inference to be drawn from the trial court's decision, it was a negative one, *i.e.*, that the trial court, after observing the prosecutor testify, did *not* give credence to her concerns about Mr. Green's occupation. The court of appeals made the only "finding" on this issue, when it "found" that the "sole reason" for this challenge was that Mr. Green was a postal worker, after rejecting the findings made by the trial court. J.A. 71-72.

Here, the court of appeals simply accepted the prosecutor's illogical explanation at face value rather than challenge her credibility. In so doing, the court abdicated its responsibility to ensure compliance with the second part of the *Batson* test. A "[court] cannot merely accept the reasons proffered at face value, but must evaluate those reasons [under the standards articulated in *Batson.*]" *Florida* v. *Slappy*, 522 So. 2d at 22. "[T]he [court] must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination . . . . This evaluation by the trial judge is necessary because it is possible that an attorney, although not intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding to strike the juror." *Branch* v. *State*, No. 6 Div. 93, slip op. at 28 (Ala. May 13, 1988).[17]

In sum, in evaluating the prosecutor's challenge of Mr. Green, the court of appeals failed to perform the exacting analysis that *Batson* requires. Rather than test the credibility of the prosecutor's explanation by objective evidence, the court accepted her concededly illogical explanation at face value. If this approach is adopted, *Batson* is undone.

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[17] The court of appeals also attempted to justify its failure to confront the irrelevance of the prosecutor's explanation on the grounds that "'[t]he challenge, after all, is still a peremptory one.'" J.A. 72. If, by this statement, it meant that an exemption from examination is necessary to preserve the very nature of peremptory challenges, the court seriously misunderstands *Batson*. *Batson* stands for the proposition that where a *prima facie* case of discrimination has been established, the prosecutor's peremptory challenges must be explained and that explanation must be evaluated under the standards established in *Batson*.

2. The court of appeals misapplied *Batson* in approving the challenge of Isabella Thomas[18]

The prosecutor explained his challenge to Ms. Thomas by testifying that he was not satisfied by her attitude toward circumstantial evidence in a case where "[circumstantial evidence] was my whole case. We had no direct evidence." *See* Batson Tr. at 106. He explained that his need to rely on the law of circumstantial evidence was due to the fact that, at the time of the challenge, he did *not* have petitioner's confession:

> Q . . . you had a confession from this defendant as to his commission of the offense in this particular case. Right?
>
> A. Right.
>
> Q. And at the time you all were conducting the voir dire the confession had been suppressed?
>
> A. That's right.
>
> Q. So, we are getting back to we did not have a confession and your case was based solely on circumstantial evidence?
>
> A. That's right.

Batson Tr. at 132.

The trial court wholly credited this explanation, noting that, although Ms. Thomas' troubles with the law of circumstantial evidence were not serious—"she . . . indicated she would follow that law if so instructed by the Court" (J.A. 48)—they became decisive in a case that was circumstantial. *Id.* The court of appeals correctly found, however, that "[c]ontrary to the . . . memory of the attorneys for the . . . parties . . . and apparently the trial

[18] The voir dire of Ms. Thomas appears at R. Vol. XI at 49-100.

judge herself . . . when the prosecuting attorney conducted his voir dire examination [of Ms. Thomas] he had appellant's written confession, which had been ruled by the trial judge to be admissible . . . . This was certainly direct evidence . . . ." J.A. 67-68.[19] As a consequence, the court of appeals found that at the time of the challenge, the prosecutor's case was not based "entirely, if at all" on circumstantial evidence. J.A. 68.

This contradiction cast such doubt on the credibility of the trial court's finding and the prosecutor's explanation that the court of appeals found the prosecutor's explanation "a little shocking and *totally not understandable.*" *Id.* (emphasis added). It concluded that "[w]ithout more, we find that we would have to hold that only an *irrational* trier of fact could have accepted this reason as a 'neutral explanation' why he used a peremptory strike on the juror." *Id.* (emphasis added).

Nonetheless, the court of appeals approved the challenge of Ms. Thomas by reasoning that, although the prosecutor had the defendant's confession at the time of the challenge, the confession "did not completely rule out an instruction . . . on the law of circumstantial evidence" (J.A. 70), and that "the prosecuting attorney exercised a peremptory on [Ms. Thomas] rather than risk a hung jury." *Id.*

a. The justification relied upon by the court of appeals was not offered by the prosecutor.

The court of appeals' explanation for the Thomas challenge was not one found by the trial court nor was it offered by the prosecutor. The prosecutor said that the

[19] The confession was subsequently suppressed on the basis of evidence that came to light after the voir dire. *See* J.A. 70.

juror's difficulty with the law of circumstantial evidence prompted the challenge because the prosecution did *not* have petitioner's confession and, as a result, circumstantial evidence "was my whole case. We had no direct evidence." The court of appeals attributed to the prosecutor an explanation that he never gave, *i.e.*, even though he had the petitioner's confession, he may have been concerned that circumstantial evidence might become relevant. In approving the Thomas challenge on the basis of an explanation of its own creation, after rejecting the explanation provided by the prosecutor as not credible, the court of appeals totally ignored the purpose of the *Batson* inquiry.

The purpose of the *Batson* inquiry is *not* to determine whether there is some explanation for the challenge that would have been adequate. The inquiry is to determine whether there has been discrimination. That requires testing the actual reason proffered by the prosecution to see whether it is genuine or pretextual. If the prosecutor's proffered reason is contradicted by the record, it cannot be accepted as genuine. *Anderson* v. *Bessemer City*, 470 U.S. 564, 575 (1985); *Roman* v. *Abrams*, 608 F. Supp. at 635; *People* v. *Hall*, 197 Cal. Rptr. at 75. The fact that there may have been other bases on which the prosecutor could have justified the challenge is irrelevant.

Once the court of appeals found that no rational fact finder "could have accepted [the] reason" proffered by the prosecutor as a "'neutral explanation'" (J.A. 72), that should have been the end of the inquiry. It is "neither the function nor the duty of the trial courts, or the appellate courts on review, to speculate as to prosecutorial motivation for . . . challenges." *People* v. *Moss*, 188 Cal. App. 3d 268, 279, 233 Cal. Rptr. 153, 159 (1986).

Indeed, the prosecutor's factually baseless explanation raises an inference of pretext. Such explanations are evidence of "selective recollection of the sort where the wish [to exclude blacks] is father to the thought." *Roman* v. *Abrams*, 608 F. Supp. 629, 635 (S.D.N.Y. 1985), *aff'd in part, rev'd in part on other grounds*, 822 F.2d 214 (2d Cir. 1987). "[A court] must . . . reject an explanation as illegitimate if it is not supported by the . . . record." *See, e.g.*, *People* v. *Hall*, 197 Cal. Rptr. at 75. After rejecting the explanation actually given, the court of appeals should have found that petitioner's *prima facie* case had not been rebutted and should have reversed his conviction.

b. The court of appeals erred in refusing to consider evidence of disparate treatment.

In sustaining the challenge of Ms. Thomas, the court of appeals also erred in refusing to consider evidence that Ms. Thomas was treated differently than similarly situated white jurors who were not challenged. Petitioner presented these comparisons in a supplemental brief submitted after the *Batson* hearing. The brief explained that nonchallenged white jurors experienced as much or more difficulty with various legal concepts, including circumstantial evidence, as did Ms. Thomas.[20]

Although the court acknowledged that such jury comparisons "cast considerable doubt upon the neutral explanations offered by counsel for the State," (J.A. 66 n.6A), it refused to consider, in reviewing the trial judge's findings, whether "unchallenged white veniremen also possessed the same purportedly undesirable characteristics [as

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[20] *See, e.g.*, voir dire of Hollingsworth (R. Vol. XIII at 1550-53); Wistert (R. Vol. VIII at 314, 318-19); Moore (R. Vol. XV at 125, 131); Deming (R. Vol. XVI at 205-07).

challenged black jurors]." *Id.* The reason given for the court's refusal to consider this evidence was that the petitioner had not made such comparisons to the trial judge at the *Batson* hearing. *Id.*

If the court of appeals had rested its decision on the trial court's findings of fact, perhaps it would have been entitled to make something of defense counsel's failure to present these comparisons to the trial court. *But see Vasquez* v. *Hillery*, 474 U.S. at 257 (holding that new analyses may be presented even to a federal habeas corpus court, when these are based on facts found in the state trial court record); *Casteneda* v. *Partida*, 430 U.S. 482, 496 & n.17 (1977) (conducting independent analyses not presented to lower courts but based on facts before those courts).

However, here the court of appeals did no such thing. It rejected the findings of the trial court and made its own *de novo* findings regarding the prosecutor's reasons for striking black jurors and the justifiability of those reasons, based on its review of the "entire jury selection process." J.A. 71. To do this, while refusing to consider evidence in the record that was inconsistent with its findings, was error. If the court of appeals was to make new findings, then it was obligated to consider evidence of record that was incompatible with those findings as well as evidence compatible with them.

The court's refusal to consider petitioner's jury comparisons is also unsupportable in light of the fact that it conducted precisely the same sort of comparison *sua sponte* in rejecting the trial court's basis for sustaining the Green challenge. *See* J.A. 72, and discussion *supra* at n.11. This underscores the lack of any legitimate procedural justification the court of appeals may have had for

refusing to consider the evidence. To disregard evidence which the court itself acknowledged "cast considerable doubt" on the prosecutor's challenges without some legitimate and evenly applied procedural justification, was impermissible under the logic of *Batson*. *Batson*, 476 U.S. at 96-98.

Comparison of the prosecutor's treatment of similarly situated jurors is highly relevant in judging the validity of the explanations offered by a prosecutor for peremptory challenges. This Court recognized in *Batson* that one basis for determining whether a prosecutor's explanation is "legitimate" is to determine whether there was "disparate treatment" between challenged black jurors and unchallenged white jurors. *Batson*, 476 U.S. at 94, n.18.[21]

If the record shows that black jurors were challenged for reasons which are equally applicable to white jurors who were not challenged, the prosecutor has engaged in "disparate treatment," and the legitimacy of his explanation is suspect. Courts have suggested that:

> *disparate treatment [of blacks and whites] is strongly suggestive of bias*, and could itself . . . warrant[] the conclusion that the prosecutor was exercising peremptory challenges for impermissible reasons.

People v. *Hall*, 672 P.2d at 859 (emphasis supplied).

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[21] "Disparate treatment" is a concept derived in part from Title VII cases. *See Batson* at 94, n.18. It has been adopted by the lower courts which conduct meaningful *Batson* review. *See People* v. *Hall*, 197 Cal. Rptr. at 76 ("Disparate treatment is strongly suggestive of bias . . . ."); *Roman* v. *Abrams*, 608 F. Supp. at 635 (disparate treatment raises an inference that the reason is "intentionally misleading."); *People* v. *Trevino*, 704 P.2d 719, 732 (Cal. 1985); *State* v. *Gilmore*, 511 A.2d at 1167.

In sustaining the Thomas challenge, while refusing to consider evidence strongly suggesting that it was based solely on race, the court of appeals committed further error.

3. The court of appeals erred in approving the challenge of Frank Samuel[22]

Although the State came closer to satisfying the requirements of *Batson* in explaining its challenge of Mr. Samuel, the court of appeals' justification for approving the challenge does not stand up to scrutiny. The court of appeals found that Samuel was struck because his "reading and writing skills were poor" and "[s]ince the case was complex and was expected to include detailed written jury instructions, the State evidently preferred to avoid literacy problems on the jury and used a peremptory strike on that person." J.A. 70. This conclusion is not supported by the record evidence.

At the *Batson* hearing the prosecutor testified that his "strong suspicion this man could not read and write" was based on the appearance of the juror information form. Batson Tr. at 135. There are two juror information forms used in Harris County: a short form that is mailed to the prospective juror and a long form which is filled out when the juror arrives for jury duty. The prosecutor testified that "in [his] opinion" someone other than Mr. Samuel had filled out the short form and that there were misspellings and incomplete or non-responsive answers on the long form.

[22] The voir dire examination of Mr. Samuel appears at R. Vol. XVI at 12-26.

During the voir dire, the prosecutor sought to confirm his suspicion that Mr. Samuel was illiterate. He asked Mr. Samuel to read the two Texas statutory sentencing questions. In response to these questions, Mr. Samuel read each of the questions without error:

> Q. Those two questions are on the board. If you will, will you read Question No. 1 for us.
>
> A. It says "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased or another would result."
>
> Q. And Question No.2?
>
> A. "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

R. Vol. XVI at 22. These are hardly the responses of an illiterate man. Mr. Samuel's ability to read these two questions not only demonstrated an ability to read but an ability to read substantially above an elementary level.[23]

[23] The trial judge apparently viewed the prosecutor's professed concern about Samuel's literacy as symptomatic of a larger problem, *i.e.*, that it may have affected Samuel's ability to understand legal concepts. J.A. 48-49. The court of appeals did not approve this view, (compare J.A. 72, with J.A. 48-49), and it is not supported by the record. The voir dire does not reflect that Mr. Samuel had any difficulty understanding legal concepts, much less that he would have "great difficulty" understanding a capital case. J.A. 49. He was questioned on the law of causation, R. Vol. XVI at 16-20, and he indicated that he could apply it. *Id.* at 20. He was questioned on the law of parties, *id.* at 20-23, and indicated that he could apply it. *Id.* at 23. He indicated he understood that the defendant has a right not to testify. *Id.* at 23-24. He indicated that he would not require a defendant to take the stand. *Id.* at 25. And he indicated that he would not require the state to prove motive if the law did not require it. *Id.* at 26.

As discussed above, a court must reject an explanation as illegitimate if it is not supported by the record. *People* v. *Hall*, 672 P.2d at 858. Such an explanation is insufficient to rebut defendant's *prima facie* case; the court of appeals should have reversed the trial court's finding with respect to Samuel.

C. The Texas Court Of Appeals Failed To Apply The Proper Standard Of Appellate Review

The court of appeals did not apply the proper standard of review in this case. It was clearly troubled by the case. After examining the challenges at issue and concluding that each should be affirmed despite its misgivings, the court felt compelled to remind trial judges that "the truth of a racially neutral explanation should be judged in part by its plausibility" and that a trial court should "not abdicate [its] responsibility to decide whether a peremptory challenge was racially motivated . . . [or] leave such questions to appellate resolution." J.A. 72. Nonetheless the court of appeals affirmed the trial court's decision here because "we . . . find and conclude that the trial judge believed the race-neutral explanations given [by the prosecutors]" and that "[the trial judge's conclusions are] supported by sufficient evidence." *Id.* at 72-73.

It is true that trial court findings are entitled to respect, and as this Court observed in *Batson*, where those findings "turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98, n.21. But the doctrine of deference does not permit an appellate court to justify its acceptance of a finding which it fails to find supported by the evidence on the lone ground that the trial court believed the prosecutor.

In *Batson*, the Court cited its recent decision in *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985), as an example of the standard of review to be applied. *Batson*, 476 U.S. at 98, n.21. In *Anderson*, the Court warned that a trial court may not "insulate [its] findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness." 470 U.S. at 575. The Court explained that "objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it." *Id.* In such circumstances, the appellate court may find clear error "even in a finding purportedly based on a credibility determination." *Id.*

Under the applicable clearly erroneous standard of review, appellate courts are required to reverse trial court findings if, based on the entire record, the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982). Where as here the factual findings of a state court control the outcome of a defendant's federal constitutional claims, this Court has insisted on examining the adequacy of State appellate review. *See Norris* v. *Alabama*, 294 U.S. 587, 590 (1935).

Adequate review of a *Batson* claim requires that a court look behind the prosecutor's explanation for the contested peremptory challenge. It must consider the prosecutor's testimony in the context of the objective facts of record to determine if the testimony provides a satisfactory explanation for excusing a minority juror although a *prima facie* case of racially discriminatory jury selection has appeared. It is the reviewing court's duty to examine the

prosecutor's reasons for the challenges in light of the totality of facts and circumstances, not to accept at face value the facial neutrality of the prosecutor's purported rationales. Ultimately, the appellate court must apply the proper legal standards to determine if the explanation was an adequate one under *Batson*.

The record in this case does not reflect the kind of careful review by the court of appeals that *Batson* demands. The court of appeals approved the Green challenge on the basis of an explanation which the court itself acknowledged was irrelevant to the case, thereby disregarding an essential element of the standards set by *Batson*. It failed to reverse the trial court's acceptance of the Thomas challenge even though the prosecutor's explanation for that challenge was rejected as "totally not understandable." And it accepted the Samuel challenge even though it, too, was unsupported by the record.

Rather than reversing the trial court's findings when it found them unsupportable, the court of appeals instead invented other bases to support the prosecutor's challenges. In the case of the Thomas challenge, the court supplied its own explanation for the challenge and approved the challenge on that basis, even though that basis had not been articulated by the prosecutor. In the case of the Green challenge, it accepted as adequate an explanation that was not advanced by the prosecutor and was not found by the trial court. And it accepted that explanation as adequate even though it conceded that it bore no logical relationship to the case. It then sought to justify its action on the ground that it was not its job to question the witness' credibility when, in fact, no credibility finding had been made. *See* the discussion associated with n.19 *supra*.

Moreover, there is no indication that the court of appeals included in its analysis a number of objective factors that strongly suggested discriminatory intent in this case. For example, the defendant here is black and his victim was white. In such cases, the incentive for discriminatory use of challenges is increased and judicial review should be more thorough. *See Commonwealth* v. *Soares*, 387 N.E.2d at 517; *People* v. *Wheeler*, 583 P.2d at 764; *People* v. *Moss*, 233 Cal. Rptr. at 158. A number of the prosecutor's explanations were inconsistent with the evidence. This pointed to an inference of pretext. *Roman* v. *Abrams*, 608 F. Supp. at 635; *People* v. *Hall*, 672 P.2d at 858. The prosecutor's explanations in other instances were implausible on their face. This also suggests pretext. *Roman* v. *Abrams*, 822 F.2d at 228; *Slappy* v. *State*, 503 So. 2d at 355. Finally, there was evidence of disparate treatment between challenged black jurors and unchallenged white jurors. Such evidence is further proof of discrimination. *Roman* v. *Abrams*, 822 F.2d at 228; *People* v. *Hall*, 672 P.2d at 858.

There is no indication that the court of appeals considered any of these factors, individually or in their totality, as independently relevant in determining the deference that should be accorded the trial court's findings. At a minimum, these factors should have caused the court to conduct a more searching review. The Texas court appears to have taken just the opposite approach.

Appellate courts have an important role to play if the protections *Batson* sought to ensure are to be a reality. They must scrupulously review the findings of trial courts, giving appropriate deference to trial court findings where such deference is warranted. But, where the findings of the trial court are unsupported or inadequate under the standards of *Batson*, appellate courts must not

be hesitant to reverse. If they are, they visibly invite and condone a regime in which *Batson* is flouted and prosecutors are given a license to violate the Constitution's guarantee of racial equality in access to the administration of justice.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Texas Code of Criminal Procedure:

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Texas Penal Code:

§ 6.03. Definitions of Culpable Mental States

(a) A person acts intentionally, or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought

to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

§ 19.02. Murder

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

§ 19.03. Capital Murder

(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or any other lesser included offense.

§ 19.05. Involuntary Manslaughter

(a) A person commits an offense if he

(1) recklessly causes the death of an individual; or

(2) by accident or mistake when operating a motor vehicle, airplane, helicopter, or boat while intoxicated and, by reason of such intoxication, causes the death of an individual.

(b) For purposes of this section, "intoxicated" has the meaning assigned that term by Subsection(a), Article 6701-1, Revised Statutes.

(c) An offense under this section is a felony of the third degree.

§ 19.07. Criminally Negligent Homicide

(a) A person commits an offense if he causes the death of an individual by criminal negligence.

(b) An offense under this section is a Class A misdemeanor.

QUESTIONS PRESENTED

1. Whether the Constitution requires, in a trial for capital murder where the court grants the defendant's request that the jury be permitted to consider a verdict of guilt of the lesser included noncapital offense of murder, that the jury also be allowed to consider the lesser included offenses of involuntary manslaughter and criminally negligent homicide.

2. Whether the prosecution rebutted Tompkins' claim under *Batson v. Kentucky*, 476 U.S. 79 (1986).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. *Course of Proceedings and Disposition Below* 2

B. *Statement of Facts* 3

1. Instructions on Lesser Included Offenses 3

2. State's Use of Peremptory Challenges 6

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. THE TRIAL COURT COMPLIED WITH *BECK V. ALABAMA* BY INSTRUCTING THE JURY ON THE LESSER INCLUDED OFFENSE OF MURDER 12

A. *Tompkins was not entitled, as a matter of federal constitutional law, to his requested instructions on two lesser included offenses* 12

B. *Tompkins was not entitled, as a matter of state law, to the requested instructions* 14

1. This Court should defer to the court of appeals' interpretation of state law 14

2. There is no evidence to support the requested jury instructions 15

3. There is no constitutional infirmity in the analysis of the court of appeals 18

II. THE STATE REBUTTED TOMPKINS' PRIMA FACIE CASE UNDER *BATSON* BY OFFERING NEUTRAL, NON-RACIAL REASONS FOR THE EXCLUSION OF BLACK VENIRE MEMBERS 20

A. *The state's reasons for exercising a peremptory challenge to exclude venire member Leroy Green were both racially neutral and related to legitimate trial considerations* 22

B. *The state's reason for exercising a peremptory challenge to exclude venire member Isabella Thomas was both racially neutral and related to legitimate trial considerations* 30

C. *The state's reasons for exercising a peremptory challenge to exclude venire member Frank E. Samuel were both racially neutral and related to legitimate trial considerations* 35

D. *The trial court was not required to undertake a sua sponte review of the entire voir dire before determining whether the prosecutor's explanations for the peremptory strikes were neutral and related to the case to be tried* 38

1. The court of appeals properly refused to consider matters which were not presented to the trial court 39

2. The procedure urged by *amici* is in conflict with *Batson* 40

3. Had the trial court made the comparison urged by Tompkins, his claim nonetheless would fail 43

E. *The record refutes any assertion that the prosecutor's strikes were based even in part on considerations of race* 46

1. *Batson* forbids only peremptory challenges made solely on the basis of race 46

2. There is no evidence of a prosecutorial policy to exclude minority venire members 47

CONCLUSION 50

TABLE OF AUTHORITIES

Cases **Page**

Alexander v. McCotter, 775 F.2d 595 (5th Cir. 1985) 13

Anderson v. Bessemer City, 470 U.S. 564 (1985) 21,43

Batson v. Kentucky, 476 U.S. 79 (1986) . . . . . *passim*

Beck v. Alabama, 447 U.S. 625 (1980) . . . . . *passim*

Chavez v. Kerby, 848 F.2d 1101 (10th Cir. 1988) 14

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) 42

Cordova v. Lynaugh, 838 F.2d 764 (5th Cir.), *cert. denied*, ___U.S.___, 108 S. Ct. 2832 (1988) 16

Crampton v. Ohio, reported sub nom. McGautha v. California, 402 U.S. 183 (1970) 19

DeMouchette v. State, 731 S.W.2d 75 (Tex. Crim. App. 1986), *cert. denied*, ___U.S.___, 107 S. Ct. 75 (1987) 33

Driscoll v. United States, 356 F.2d 324 (1st Cir. 1966) 16

Fitzgerald v. United States, 719 F.2d 1069 (10th Cir. 1983) 16

Government of Virgin Islands v. Carmona, 422 F.2d 95 (3rd Cir. 1970) 16

Gray v. Mississippi, ___ U.S.___, 107 S. Ct. 2045 (1987) 23

Hankins v. State, 646 S.W.2d 191 (Tex. Crim. App. 1981) 33

Harris v. New York, 401 U.S. 222 (1971) 19

Heath v. Alabama, 474 U.S. 82 (1985) 40

Hill v. Kemp, 833 F.2d 927 (11th Cir. 1987) 15

Holloway v. Florida, 449 U.S. 905 (1980) 14

Hopper v. Evans, 456 U.S. 605 (1982) 15

Illinois v. Gates, 462 U.S. 213 (1983) 40

Jenkins v. Anderson, 447 U.S. 232 (1980) 19

Leland v. Oregon, 343 U.S. 960 (1952) 20

Lockett v. State, 517 So.2d 1346 (Miss. 1987) 28

Mabry v. Klimas, 448 U.S. 444 (1980) 14

Maggio v. Fulford, 462 U.S. 111 (1983) 28

Marshall v. Lonberger, 459 U.S. 422 (1983) 28

Miller v. Stagner, 757 F.2d 988 (9th Cir. 1984), *cert. denied*, 475 U.S. 1048 (1986) 14

Nichols v. Gagnon, 710 F.2d 1267 (7th Cir. 1983), *cert. denied*, 466 U.S. 942 (1984) 13

Patton v. Yount, 467 U.S. 1025 (1984) 28,38

Prather v. Rees, 822 F.2d 1418 (6th Cir. 1987) 14

Sansone v. United States, 380 U.S. 343 (1965) 15,16

Slappy v. State, 522 So.2d 18 (Fla.), *cert. denied*, ___ U.S. ___, 56 U.S.L.W. 3880 (June 28, 1988) 21

Smith v. Phillips, 455 U.S. 209 (1982) 14,22

South Dakota v. Neville, 459 U.S. 553 (1983) 19

State v. Antwine, 743 S.W.2d 51 (1988) 43

State v. Jackson, 322 N.C. 251, 368 S.E.2d 838 (1988), *cert. pending*, ___U.S.___, No. 88-5159 (1988) 39

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 42

United States v. Busic, 592 F.2d 13 (2d Cir. 1978) 15,16

United States v. Cartlidge, 808 F.2d 1064 (5th Cir. 1987) 28

United States v. Collins, 690 F.2d 431 (5th Cir. 1982) 17

United States v. Davis, 809 F.2d 1194 (6th Cir.), *cert. denied*, ___U.S.___, 107 S. Ct. 3234 (1987) 39

United States v. Echeverri-Jaramillo, 777 F.2d 933 (4th Cir. 1985), *cert. denied*, ___U.S.___, 106 S. Ct. 1237 (1986) 16

United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987) 28

United States v. Garcia-Duarte, 718 F.2d 42 (2d Cir. 1983) 16

United States v. Garrison, 849 F.2d 103 (4th Cir. 1988) 39

United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir. 1988) 39

United States v. Harvey, 701 F.2d 800 (9th Cir. 1983) 16

United States v. Leifer, 778 F.2d 1236 (7th Cir. 1986) 16

United States v. Oregon Medical Society, 343 U.S. 326 (1952) 28,38

United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987) 28,39

United States v. Tucker, 836 F.2d 334 (7th Cir. 1987) 39

United States v. Vaccarro, 816 F.2d 443 (9th Cir.), *cert. denied*, ___U.S.___, 108 S. Ct. 295 (1987) 28

Valles v. Lynaugh, 835 F.2d 126 (5th Cir. 1988) 15

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977) 47

Washington v. Davis, 426 U.S. 229 (1976) 20,47

Whitus v. Georgia, 385 U.S. 545 (1967) 20

Constitutions, Statutes and Rules

U. S. Const., amend. V 2

U. S. Const., amend. VIII 2

U. S. Const., amend. XIV 2

28 U.S.C. § 1257(3) 2

Tex. Code Crim. Proc. Ann. art. 37.071 2

Tex. Penal Code § 6.03 2

Tex. Penal Code § 6.04 26

Tex. Penal Code Ann. § 12.21 17

Tex. Penal Code § 19.02. 2

Tex. Penal Code § 19.03 2

Tex. Penal Code § 19.05 2

Tex. Penal Code § 19.07 2,17

No. 87-6405

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1988

PHILLIP D. TOMPKINS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Writ Of Certiorari
to the Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is included in the Joint Appendix, hereinafter "J.A.," at pages 56-102. *Tompkins v. State,* ___ S.W. 2d___, No. 68,870 (Tex. Crim. App. Oct. 7, 1987). Tompkins' motion for leave to file motion for rehearing was denied without written order. The trial court's findings on Tompkins' *Batson* claim also are contained in the Joint Appendix (J.A. 47-49).

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[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Tompkins."

JURISDICTION

Tompkins seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Tompkins bases his claims on the fifth, eighth and fourteenth amendments to the United States Constitution. Also involved herein are Sections 6.03, 19.02, 19.03, 19.05 and 19.07 of the Texas Penal Code, which are attached to Petitioner's Brief as an Appendix.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below*

On January 30, 1981, Tompkins was indicted for the capital murder of Mary D. Berry. The indictment alleged that on or about January 26, 1981, Tompkins killed Berry while in the course of committing and attempting to commit the offenses of robbery and kidnapping of Berry. Tompkins pled not guilty and was tried by a jury, which, on June 11, 1981, found him guilty as charged. On June 15, 1981, following a separate hearing on punishment, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071, and thereafter the trial court assessed punishment of death. During the pendency of Tompkins' appeal, this Court delivered its opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986), and the Court of Criminal Appeals remanded for a hearing at which the state was required to explain its use of peremptory strikes to exclude black venire members. The *Batson* hearing was held on June 3 and 4, 1987, and on June 11, 1987, the trial court entered

findings of fact and conclusions of law in which it found that the state had refuted Tompkins' *Batson* claim. On October 7, 1987, the Court of Criminal Appeals affirmed the conviction. *Tompkins v. State*, ___S.W. 2d___, No. 68,870 (Tex. Crim. App. Oct. 7, 1987). On May 16, 1988, this Court granted Tompkins' petition for writ of certiorari.

B. *Statement of Facts*

1. Instructions on Lesser Included Offenses

The state's case against Tompkins, although based entirely on circumstantial evidence, was formidable. At the guilt-innocence phase of trial, the state adduced testimony from fifty-nine witnesses and introduced more than two hundred exhibits to prove that Tompkins had committed the offense of capital murder as alleged in the indictment. Tompkins did not testify or introduce any evidence.

The state's evidence showed that Mary D. Berry, a 24-year-old pharmacist at Hermann Hospital in Houston, Texas left work at approximately 11:00 p.m. on January 25, 1981 (R. XVIII 28).[2] At 12:30 a.m. a policeman found Berry's car abandoned at a Houston intersection with its lights on and its engine running (R. XVIII 59).

At 1:30 a.m. on January 26, 1981, Johnny Davis, a night clean-up man at the Fondren Southwest Bank in Houston, saw Tompkins drive up to the bank in a

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[2]"R." refers to the record in the court below, the volume referenced by Roman numeral and the page by Arabic number. "B.H." refers to the transcript of the *Batson* hearing. "A." refers to the Appendix attached to this brief.

maroon Chevrolet Monte Carlo automobile, operate the automatic teller machine and place money from the machine in his pockets (R. XVIII 93-99). After Tompkins left the bank, Davis found a receipt for $1,000 on the top of the automatic teller machine (R. XVIII 100).

The audit tape in the teller machine showed that Berry's bank card was used to withdraw $1,000 at 1:30 a.m. on January 26, 1981 (R. XIX 69-75). A camera attached to the automatic teller machine photographed Tompkins using the machine at 1:30 a.m. on that date (R. XIX 65-66). The times of the photographs matched the times on the audit tape when Berry's card was used to withdraw $1,000 from the machine (R. XVIII 129-31, R. XIX 64-65).

Berry's body was found the next morning bound, gagged and tied to a tree (R. XX 77, 110-115; R. XXII 6). Her ankles had been tied together and to the tree with a bedsheet and part of an electrical cord (R. XX 124), and her hands were tied together and "very securely tied" to her neck by another piece of sheet material (R. XX 125, 127). A gag of the same bedsheet material was shoved in her mouth and wrapped around it (R. XX 123, R. XX 6-7). Berry died of suffocation (R. XXII 26). Her mouth remained open when the gag was removed because it had been in that position when rigor mortis set in due to the gag being "stuffed deep into the mouth into the posterior pharynx, which is the back-most part of the mouth opening" (R. XXII 7). Berry's tongue was pushed deep into the posterior pharynx (R. XXII 20), and there was bloody fluid exuding from her ear channels due to her eardrums having popped as she suffocated (R. XXII 9). In addition, her lips were discolored due to the pressure of the gag against them (R. XXII 12), there was a pale line around her neck due to the pressure of the strip of shirt

tied around her neck (R. XXII 9, 13), and there was extensive hemorrhaging into the whites of her eyes due to asphyxiation (*id*). When asked how much of the sheet had been put into Berry's mouth, the medical examiner replied, "As much as was possible to push in there" (R. XXII 31).

Tompkins was arrested in Austin, Texas on January 28 near his car (R. XX 145-55), a maroon Monte Carlo (R. XX 183). A search of the car produced a brown wallet containing two drivers' licenses, one belonging to Tompkins and one to Berry (R. XXII 72). In the wallet was Berry's "Quicksilver" bank card and several of her credit cards (R. XXII 73). The search of the automobile also produced a watch and chain and a purse and calculator belonging to Berry (R. XXII 71, R. XXIII 20-21). A tape recorder was found in the trunk of the car with a cord that had been severed (R. XXII 77). A laboratory analysis matched the severed cord of the tape recorder with the electrical cord that had been used to bind Berry's ankles (R. XXII 136), Tompkins' fingerprints were found on Berry's "Quicksilver" card (R. XXII 159-60).

Tompkins requested that the jury be instructed on the lesser included offenses of murder (J.A. 26-27), involuntary manslaughter (J.A. 28) and criminally negligent homicide (J.A. 29-30). The trial court denied the latter two requested charges but did instruct the jury on the lesser included offense of murder (J.A. 37). The court also instructed the jury that it could not find Tompkins guilty of capital murder unless it found beyond a reasonable doubt that he specifically intended to kill his victim (J.A. 36) and that any doubt as to whether he was guilty of capital murder or simple murder should be resolved by finding him not guilty of the former and guilty of the latter (J.A. 37) In closing argument, defense counsel offered the jury two

inconsistent theories: that Tompkins was not guilty of any offense (R. XXIV 8, 14, 17-14, 34-35, 37, 42) or that he was guilty of the less serious crime of murder (R. XXIV 39, 47-48).

2. State's Use of Peremptory Challenges

One of the venire members which the state excluded by use of a peremptory challenge was Leroy Green. The court asked preliminary questions of Green (R. XVI 94-97). The prosecutor then explained the elements of the offense of capital murder (R. XVI 98-100), following which she questioned Green as to his views on the death penalty. Although Green had told the court that he had no objection to the death penalty, he equivocated when questioned by the prosecutor.

> Now, you know that you were asked about your feelings on the death penalty, and I believe you indicated to her that you had no objection to it; is that correct?
>
> A Yes, ma'am.
>
> Q Have you always felt that way?
>
> A Well, I don't know. I guess so. But then, again, it's like you said: Sometimes I felt that way and sometimes I didn't.

(A. 1; R. XVI 100-01). When the prosecutor asked whether, in an appropriate case, Green could apply the law of causation, he said, "I believe I might have a little trouble with that." (A. 3; R. XVI 109). When she asked whether Green would require her to show premeditation in order to find the defendant guilty, he replied, "I don't think so." (A. 9; R. XVI 115).

At the *Batson* hearing, the prosecutor testified that she used a peremptory challenge to exclude Green because he had "flip flopped throughout the years" in his views on the death penalty and "had no strong feelings one way or the other" (A. 11; B.H. 209); because he often answered her questions by nodding his head or giving one-word responses (*id.*), which indicated that "he was not a very articulate person or didn't have any explanations or feelings that he was sharing with me" (A. 11; B.H. 210); because he had difficulty understanding the law of causation and premeditation and "flip flopped" in his responses to questions on those issues (A. 11-12; B.H. 210-11) and because, when she asked him about the second special issue on punishment, "his facial expressions were one of puzzlement or uncomfortable or hostility or something that indicated to me that he was in disagreement about it . . . " (A. 13; B.H. 211-12).

The trial court made the following findings regarding the state's exclusion of Green:

> Mr. Green testified that over the years he had frequently changed his opinion on the propriety of the death penalty and that his wife was opposed to the death penalty; he frequently made non verbal answers or "yeahs"; there was no valid communication between the prosecutor and the juror. The juror had problems with and vascillated [sic] regarding his ability to follow the law of causation and indicated that he might require evidence of premeditation.
>
> The State's excusal of Mr. Green was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

(J.A. 49).

The state also used a peremptory challenge to exclude venire member Isabella Thomas. Following some preliminary questions by the court (R. XI 49-51), the prosecutor conducted his voir dire of Thomas. He questioned her about reasonable doubt (R. XI 52-53), the elements of the offense of capital murder (R. XI 53-56), the range of punishment for the lesser included offense of murder (R. XI 55), the requirement of proving intent as well as the law governing criminal responsibility for the acts of another (R. XI 56-59), the fact that the state need not prove motive (R. XI 60-61), the privilege against self-incrimination (R. XI 61-62), the presumption of innocence (R. XI 63) and the special issues at the punishment phase of trial (R. XI 64-72).

The prosecutor then questioned Thomas at some length regarding the law of circumstantial evidence. When asked whether she could find a defendant guilty of capital murder based solely on circumstantial evidence, Thomas replied "I don't think so." (A. 15; R. XI 73). When the court rephrased the question for Thomas, she responded as follows:

> Be all circumstantial, but it would be enough to prove, to convince me beyond a reasonable doubt? Okay, I am good at doing things when it comes straight out, but I don't know about the circumstantial.

(*Id.*). When asked whether she would require the state to produce an eyewitness before she could find a defendant guilty of capital murder, Thomas replied as follows:

> I don't know. Not possible. But I guess it would be kind of - I don't know - it would be

> kind of hard for me - I don't know. Kind of got me on that one.

(A. 16; R. XI 74).

At the *Batson* hearing, the prosecutor testified that he struck Thomas because she had problems with the law of circumstantial evidence (A. 21-24; B.H. 106-09).

The trial court made the following findings regarding the state's exclusion of Thomas:

> Mrs. Thomas at first said she could not follow the law on circumstantial evidence that was in effect at the time of the voir dire and upon which the State relied for a conviction, and though she later indicated she could follow that law if so instructed by the Court, the prosecutor was skeptical about her ability to do so.
>
> The State's excusal of Mrs. Thomas was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

(J.A. 48).

The state also used a peremptory challenge to exclude venire member Frank E. Samuel. The court asked Samuel some preliminary questions (R. XVI 12-15), following which the prosecutor questioned him. When asked whether he could apply the law of causation in a capital murder case, Samuel replied, "Can I apply? Can I apply?" (A. 28; R. XVI 19). The prosecutor then rephrased the question and Samuel made no verbal response but instead answered by nodding his head; the prosecutor again rephrased the

question, to which Samuel replied, "I think so." (A. 28; R. XVI 20). Later, when asked whether he could apply the law of parties, Samuel said, "I think I would." (A. 30; R. XVI 23).

At the *Batson* hearing, the prosecutor testified that he struck Samuel because he was marginally literate and was not, in the prosecutor's estimation, able to grasp the issues which were involved in the case (A. 36-37; B.H. 137-39).

The trial court made the following findings regarding the state's exclusion of Samuel:

> Mr. Samuel, though not illiterate, could not satisfactorily fill out juror information sheets and questionnaires, and obviously had extreme difficulty with legal concepts. The prosecutor felt that he would have great difficulty in understanding the complexities of a capital case. Although less time was spent questioning Mr. Samuel than on some other jurors, it was obvious that that was motivated by what was perceived as Mr. Samuel's inability to understand and comprehend the issues, and not on the fact that he was black.
>
> The State's excusal of Mr. Samuel was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

(J.A. 48-49).

SUMMARY OF ARGUMENT

The opinion of the court below is fully consistent with this Court's holding in *Beck v. Alabama*, 447 U.S. 625 (1980). The trial court instructed the jury on the lesser included offense of murder, thus satisfying *Beck's* requirement that the jury be given a "third option" to either acquitting the defendant or finding him guilty of capital murder. Because the jury was afforded this third option, which it rejected, the court was not required to instruct on the other lesser offenses of involuntary manslaughter and criminally negligent homicide.

In addition, this Court should defer to the construction of Texas law made by the court below in holding that Tompkins was not entitled to his requested instructions. Even should the Court undertake to second-guess the state court's interpretation of its own law, Tompkins is not entitled to relief because there was no evidence in the record to support the instructions. The court below infringed on no constitutionally protected right by requiring that the record contain evidence to support *Beck* instructions on lesser offenses. Inasmuch as there was no such evidence, and defense counsel argued inconsistent defensive theories by suggesting more than one set of inferences which the jury might have drawn from the state's evidence, there was no factual dispute as to any of the elements of capital murder so as to warrant the instructions in question.

There is no merit to Tompkins' assertion that the prosecutors excused black venire members on the basis of race. In order to properly resolve Tompkins' claim under *Batson v. Kentucky*, 476 U.S. 79 (1980), this Court should examine the prosecutors' stated reasons for their peremptory challenge as well as the findings of the trial court, because many of the findings of the court of appeals are unsupported by the record and at odds with the reasons advanced by the prosecutors, which the trial court credited. None of the prosecutors' peremptory challenges was based, even in part, on the

race of the venire members, and there is nothing in the record to show that their stated reasons were false or pretextual. *A fortiori*, the state successfully rebutted Tompkins' prima facie case under *Batson*.

ARGUMENT

I.
THE TRIAL COURT COMPLIED WITH *BECK V. ALABAMA* BY INSTRUCTING THE JURY ON THE LESSER INCLUDED OFFENSE OF MURDER.

A. *Tompkins was not entitled, as a matter of federal constitutional law, to his requested instructions on two lesser included offenses.*

In *Beck v. Alabama*, 447 U.S. 625 (1980), the Court invalidated a provision of the Alabama death penalty statute that precluded the jury from being instructed on a lesser included noncapital offense. *Beck* rested on the proposition that when "the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637.

In the case at bar, Tompkins requested that the jury be instructed on the lesser included offenses of murder (J.A. 26-27), involuntary manslaughter (J.A. 28) and criminally negligent homicide (J.A. 29-30). The court instructed the jury on the lesser included offense of murder (J.A. 37) but refused Tompkins' other two requested charges. Thus, consistent with *Beck*, the court afforded the jury a "third option" to either acquitting Tompkins or finding him guilty of a capital

offense. Tompkins received exactly that for which he asked, and the instruction which the court gave satisfied the *Beck* Court's concern that failure to instruct on lesser included offenses "interjects irrelevant considerations into the fact-finding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.* at 642.

Tompkins argues that even though the court instructed the jury on the offense of murder, it nonetheless was required by *Beck* to charge on the other, less serious offenses (Pet. Brief 23). *Beck* does not so hold, but instead left open this question. *Id.* at 630 n.5. As the court below noted, the two offenses in question--involuntary manslaughter and criminally negligent homicide--are lesser included offenses of capital murder only in the sense that they are included within the lesser offense of simple murder, on which the jury was instructed:

> Criminally negligent homicide may be a lesser included offense of involuntary manslaughter, which may be a lesser included offense of murder, which may be a lesser included offense of capital murder.

(J.A. 85). If Tompkins had been charged with only murder rather than capital murder, he would have had no constitutional entitlement to the requested instructions, even had there been evidence to support them.[3] That he was in fact charged with a capital

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[3]A majority of the circuits adhere to the rule that an instruction on a lesser included offense is not a matter of constitutional right in a non-capital case. *See, e.g., Alexander v. McCotter*, 775 F.2d 595, 601 (5th Cir. 1985); *Nichols v. Gagnon*, 710 F.2d 1267, 1269 (7th Cir. 1983), *cert. denied*, 466 U.S. 942

(footnote continued on next page)

offense should not lead to a different result, given that the jury was in fact afforded the "third option" mandated by *Beck*.

B. *Tompkins was not entitled, as a matter of state law, to the requested instructions.*

1. This Court should defer to the court of appeals' interpretation of state law.

It is settled beyond peradventure that violations of state law do not, standing alone, implicate the Constitution, and that "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimensions." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). *See also Mabry v. Klimas*, 448 U.S. 444, 447 (1980) (construction of state statute "plainly a matter for the state courts to decide. . . ."). The court of appeals below found, as a matter of state law, that the evidence did not sufficiently raise the issues of involuntary manslaughter and criminally negligent homicide so as to require that the jury be instructed as to those offenses. As discussed, *infra,* at 15-20, the Texas court's interpretation of its own law is correct, analytically sound and devoid of any constitutional implications. This Court should refuse to second-guess this construction of state law given by the highest

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(footnote continued from previous page)
(1984); *Miller v. Stagner*, 757 F.2d 988, 993 (9th Cir. 1984), *cert. denied,* 475 U.S. 1048 (1986); *Chavez v. Kerby,* 848 F.2d 1101, 1103 (l0th Cir. 1988). *Cf. Prather v. Rees*, 822 F.2d 1418, 1423 (6th Cir. 1987). The *Beck* Court found it unnecessary to address this question. *Beck*, 447 U.S. at 638 n.14. *See also Holloway v. Florida*, 449 U.S. 905 (1980) (BLACKMUN, J., dissenting to denial of certiorari).

Texas criminal court. *See, e.g., Valles v. Lynaugh,* 835 F.2d 126, 127-28 (5th Cir. 1988); *Hill v. Kemp*, 833 F.2d 927, 929 (llth Cir. 1987) (federal court must defer to state court's decision whether defendant was entitled to lesser included offense instruction).

2. There is no evidence to support the requested jury instructions.

Tompkins complains because the court below rejected his claim on the ground that there was no evidence in the record which supported the requested instructions. According to Tompkins, "*Beck* does not require a defendant in a capital case to testify or present evidence in order to obtain [such] instructions . . . " (Pet. Brief 16). Again, Tompkins misreads *Beck*, a case in which there was affirmative evidence, including the defendant's own testimony, to support the requested jury instructions, to which the defendant would have been entitled but for Alabama's preclusion clause. *Cf. Hopper v. Evans*, 456 U.S. 605 (1982) (instruction on lesser included offense not required where not raised by the evidence).

This Court has not delineated exactly what type or quantum of evidence is required to support a *Beck* instruction on a lesser offense. Guidance to the correct answer to this question may be found, however, in many of the courts of appeals' explications of *Sansone v. United States,* 380 U.S. 343 (1965), which requires that lesser included instructions be given in federal prosecutions. The better view is that such instructions must be given only where the defendant actually presents evidence which creates a factual conflict. As the Second Circuit cogently explained in *United States v. Busic*, 592 F.2d 13 (2d Cir. 1978):

> [A] defendant is entitled to a lesser-offense charge only where there is some rational

> basis for such a charge and "the evidence justifies it." Thus a defendant is not entitled to a lesser-offense charge merely because he formally contests elements of the greater charge which distinguish it from the lesser. The contest must be real. He must produce enough evidence to justify a reasonable juror in concluding that he committed the lesser offense but did not commit the greater offense.

Id. at 24. *Accord, United States v. Echeverri-Jaramillo*, 777 F.2d 933 (4th Cir. 1985), *cert. denied*, ____U.S.___, 106 S. Ct. 1237 (1986); *Fitzgerald v. United States*. 719 F.2d 1069, 1071-72 (10th Cir. 1983); *United States v. Harvey*, 701 F.2d 800, 807 (9th Cir. 1983); *Government of Virgin Islands v. Carmona*, 422 F.2d 95, 101 (3rd Cir. 1970).[4]

Here, there was *no* evidence in the record which might have supported Tompkins' requested instructions. Tompkins does not assert to the contrary, but instead suggests that the instructions were required because of the different inferences the jury might have drawn from the state's evidence (Pet. Brief 16-22). This argument should be rejected for two reasons. First, because there rarely are eyewitnesses to capital

[4]There is Second Circuit dicta to the effect that conflicting inferences from undisputed evidence may support a *Sansone* charge. *United States v. Garcia-Duarte*, 718 F.2d 42, 47-48 (2nd Cir. 1983). The rule in the First and Seventh Circuits is that such instructions are required if the issue is raised by a conflict in the evidence or if the lesser included offense might fairly be inferred from the uncontradicted evidence. *United States v. Leifer*, 778 F.2d 1236, 1246 (7th Cir. 1986); *Driscoll v. United States*, 356 F.2d 324, 326-28 (1st Cir. 1966). The Fifth Circuit has held, in a capital case, that a conflicting inferences may warrant such an instruction. *Cordova v. Lynaugh*, 838 F.2d 764, 769 (5th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2832 (1988).

murders, such cases usually are based on circumstantial evidence, absent a confession, as was this one. If the Court accepts Tompkins' suggested rule--that the possibility of conflicting inferences from uncontradicted testimony creates a *Beck* issue--the result will be that in circumstantial cases the trial courts will be required to charge on every conceivable form of homicide regardless whether the defendant adduces any evidence. The irrationality of this standard is well illustrated by the case at bar, in which Tompkins argues that a jury might have considered his barbaric acts to constitute an offense no more serious than criminally negligent homicide, a Class A misdemeanor with a maximum punishment of a $2,000 fine and a year in jail. Tex. Penal Code Ann. §§ 19.07(b), 12.21. Such a result would truly "so pervert the law as to be ludicrous." *United States v. Collins*, 690 F.2d 431, 438 (5th Cir. 1982).

Second, as the instant case also well illustrates, such a rule would allow defendants to assert inconsistent defenses to their benefit and the unfair detriment of the state. Because Tompkins did not present any evidence to warrant the requested instructions, his only vehicle for suggesting which inferences he wished to have the jury draw was the closing argument of counsel. Yet defense counsel also argued at length--in sharp conflict to Tompkins' theory of "guilty of some crime but not capital murder"--that Tompkins should be found not guilty because there was no evidence linking him to the crime (R. XXIV 8, 14, 17-24, 34-35, 37, 42). Thus, Tompkins' theory that he was guilty of some offense less than capital murder was only an alternative defense to his theory of "not guilty." Under these circumstances, it can hardly be said that there was a sharply contested dispute as to one of the elements of the greater offense so as to require the requested instructions on the lesser offenses. To hold

otherwise would serve not to enhance the reliability of the fact-finding process but rather to condone manipulation of the judicial system.

3. There is no constitutional infirmity in the analysis of the court of appeals.

Under Tompkins' view of Texas law, he necessarily was entitled to one or the other of the two instructions which the trial court refused:

> Either the jury was required to infer that petitioner was aware of the risk that his conduct created, as the court found in discussing criminal negligence, or it was required to infer that he was unaware of that risk, as the court appears to have assumed in discussing recklessness. If the jury was required to infer that petitioner was aware of the risk that his conduct created, then the jury could reasonably have concluded that he recklessly killed the deceased, and convicted him of involuntary manslaughter. If, on the other hand, the jury was required to infer that petitioner was unaware of the risk that his conduct created, then the jury could reasonably have inferred that he negligently killed the deceased, and convicted him of criminally negligent homicide. In either case, the evidence would support a verdict of guilty of a lesser included noncapital offense, and Beck required that the jury be instructed regarding that offense.

(Pet. Brief 20). Of course, the jury was not "required" to draw either inference. This is not a case, contrary to Tompkins' assertions, in which there was a rational

evidentiary basis for inferring that Berry's death was due to recklessness or negligence. As discussed, *supra*, at 4-5, the uncontradicted evidence showed that Tompkins stuffed his victim's mouth completely full, thus causing her eardrums to rupture and her eyeballs to turn red with blood as she asphyxiated. Absent affirmative evidence that Tompkins did not intend to kill Berry, no rational jury could have drawn the inferences which Tompkins argues were "required."

Similarly, there is no substance to Tompkins' argument that the holding of the court below somehow forced him to surrender one constitutional right to assert another. That a defendant's right to remain silent is not absolute should be clear from the Court's holdings in *South Dakota v. Neville*, 459 U.S. 553, 564 (1983), and *Jenkins v. Anderson*, 447 U.S. 232, 235-38 (1980), that a defendant who asserts the privilege against self-incrimination may thereby suffer adverse consequences. As the Court stated in *Crampton v. Ohio, reported sub nom. McGautha v. California*, 402 U.S. 183 (1970):

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

Id. at 213 (citation omitted). *See also Harris v. New York*, 401 U.S. 222, 225-26 (1971) (defendant who testifies may be impeached with prior inconsistent statements which would otherwise be inadmissible).

The court below's insistence that Tompkins adduce evidence to support the requested instructions was a constitutionally permissible allocation of the burden of proof. In *Leland v. Oregon*, 343 U.S. 960 (1952), for example, the Court found no constitutional defect in a statute which required a defendant to prove his insanity beyond a reasonable doubt in order to obtain an acquittal. *Id.* at 797-99. Inasmuch as *Leland* approves such burden-shifting on an issue which could result in an acquittal, surely it was constitutionally permissible for the court of appeals to require Tompkins to adduce evidence in order to secure a jury instruction on lesser included offenses.

II.

THE STATE REBUTTED TOMPKINS' PRIMA FACIE CASE UNDER *BATSON* BY OFFERING NEUTRAL, NON-RACIAL REASONS FOR THE EXCLUSION OF BLACK VENIRE MEMBERS.

A criminal defendant who is a member of a racial minority is denied equal protection when the state, with the intent to purposefully discriminate against members of the defendant's race, exercises its peremptory challenges to remove members of that race from the petit jury. *Batson v. Kentucky*, 476 U.S. 79, ___, 106 S. Ct. 1712, 1718 (1986). A defendant who claims that he has been denied equal protection by the state's use of peremptory challenges bears the burden of proving that the prosecutor's challenges are attributable to a racially discriminatory purpose. *Id.* at ___, 106 S. Ct. at 1721, *citing Washington v. Davis*, 426 U.S. 229, 240 (1976), and *Whitus v. Georgia*, 385 U.S. 545, 550 (1967). Once the defendant establishes a prima facie case of racial discrimination in the prosecutor's exercise of peremptory challenges, the burden shifts to the state to come forward with an

explanation for the exclusions which is both neutral and related to the particular case to be tried. *Id.* at ___, 106 S. Ct. at 1723. While a mere affirmation of good faith is insufficient, the prosecutor's explanation need not rise to the level justifying a challenge for cause. *Id.*

Batson thus places upon the trial court the duty to determine whether the state has engaged in purposeful discrimination. *Id* at ___, 106 S. Ct. at 1723-24. This determination, which is largely dependent upon the trial court's assessment of credibility of the person offering the explanation as well as the asserted reasons, is a factual finding entitled to great deference upon review. *Id.* at ___ n. 21, 106 S. Ct. at 1724 n. 21, *citing Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *see also Slappy v. State*, 522 So.2d 18, 22 (Fla.), *cert. denied*, ___ U.S. ___, 56 U.S.L.W. 3880 (June 28, 1988).

In the instant case, the trial court made findings of fact and conclusions of law in which it found that the explanations offered by the state for each of its five peremptory challenges to black venire members were neutral, legitimately related to the case to be tried and not racially motivated (J.A. 47-49). The trial court's determinations are in full accord with the evidence adduced at the *Batson* hearing.

While the Texas Court of Criminal Appeals purported to defer to the trial court's findings in denying Tompkins' challenge to the composition of the jury, that court in fact undertook to reassess the credibility of the witnesses' testimony and to redetermine the factual findings. The result is that the opinion of the Texas Court of Criminal Appeals, almost without exception, either misrepresents or overlooks the neutral explanations which were offered by the prosecution and credited by the trial court. While the

court of appeals did not reject or disapprove of any of the trial court's findings, it did not rely on them but instead drew its own inferences from the record as to the reasons for the prosecutors' exercise of their peremptory strikes. It is well established that the Court of Criminal Appeals is not a fact-finding court, as the court stated in its opinion in the case at bar (J.A. 65). Because the Court of Criminal Appeals is not a fact-finding court and because the factual bases it found to be the reasons for the prosecutor's exercise of their peremptory strikes are at odds with the record and the findings of the trial court, which heard the witnesses and observed their demeanor, the proper focus of this Court is on the findings of the trial court and not the erroneous and unsupported conjectures of the court of appeals.[5]

A. *The state's reasons for exercising a peremptory challenge to exclude venire member Leroy Green were both racially neutral and related to legitimate trial considerations.*

The trial court found that the state exercised a peremptory challenge to venire member Green for the following reasons: (1) over the years he had frequently changed his opinion on the propriety of the death penalty and his wife opposed the death penalty; (2) his responses to questions during voir dire were frequently non-verbal or "yeahs;" (3) he vacillated regarding his ability to follow the law of causation; and (4) he indicated that he might require evidence of premeditation (J.A. 49). Each of these reasons is racially neutral and rationally related to the case to be tried.

[5]The state may defend the judgment of the court below on any ground which the law and record permit. *Smith v. Phillips*, 455 U.S. 209, 215 n. 6 (1982).

Moreover, the determinations of the trial court are fully supported by the evidence introduced at the *Batson* hearing and the voir dire of Green. The prosecutor testified at the *Batson* hearing that

> [d]uring the questioning [Green] indicated that he used to be opposed to the death penalty. Sometimes he is opposed and sometimes not, and he flip flopped throughout the years. He apparently had no strong feelings one way or the other, which was a concern to me. He also indicated his wife opposed the death penalty.

(A. 11; B.H. 209). The prosecutor was entitled to exercise a peremptory challenge based on her assessment that Green possibly harbored doubts about the death penalty which could interfere with his ability to impartially consider the state's case. *See Gray v. Mississippi*, ___ U.S. ___, 107 S. Ct. 2045, 2056 (1987) (prosecutors often use peremptory challenges to remove venire members who express a degree of hesitation against the death penalty). The determination that the prosecutor's assessment was both a racially neutral and relevant basis for a peremptory challenge is not undermined by the fact that Green's responses during voir dire did not indicate a level of bias against the death penalty sufficient to support a challenge for cause. *See Batson*, 476 U.S. at ___, 106 S. Ct. at 1723.

At the *Batson* hearing, the prosecutor also stated that Green's responses regarding the law of causation concerned her.

> When I got to the point in my voir dire about causation, that was on page 109 of the transcript, he indicated that quote, I believe I might have a little trouble with

> that, and at that point I believe the transcript shows that the Judge interceded and had a conversation with him explaining it a little further and in response to the Judge's explanation he flip flopped and decided that he wouldn't have a problem with it, so that was a concern to me because causation was one of the issues that we felt we would be touching on in this case.

(A. 11-12; B.H. 210).

The basis for the prosecutor's uncertainty about Green's ability to apply the law of causation is apparent in the record of the voir dire.

> Q. For instance, if the robber goes into that bank and he has the gun with no bullets but he is going to use it and threaten the person into giving him money and he goes up to the teller with that gun and points it at the teller and says, "this is a holdup; give me your money," and the security guard overhears the bank robbery and he pulls his gun and fires at the robber and he misses and hits an innocent person and kills that innocent person, the law says that the bank robber is the one who can be charged with capital murder of that innocent person, because, during the course of the bank robbery, another offense was committed. And the law says when you put something into motion, you are going to be responsible for the results. So even though the bank robber didn't shoot the innocent person, he can be found guilty of capital murder of that innocent bystander. That's what is called the law of causation.

> Now, in a proper case in a capital murder would you be able to use and follow the law of causation in finding a defendant guilty?
>
> A. I believe I might have a little trouble with that.
>
> Q. You might have trouble with it. Do you agree with the law of causation?
>
> . . .
> THE COURT: ... Mr. Green, what she is trying to find out is if the Court tells you thats what the law is in the Court's charge -- and believe me, it will be lots more complicated than the way she put it.
>
> Juror Green: It's kind of complicated.

(A. 2-3; R. XVI 108-09).

The state's case against Tompkins depended in large part on the issue of causation. The evidence demonstrated that Tompkins abducted the victim, took her bank-teller card after she gave him the code necessary for its use, and tied her to a tree. The victim suffocated to death after gagging on the cloth gag that had been crammed into her mouth. The jury was instructed as follows regarding the law of causation:

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that:
>
> 1. A different offense was committed; or
>
> 2. A different person or property was injured, harmed or otherwise affected.

(J.A. 36).[6] The state necessarily sought a juror who was able to consider and willing to apply the law of causation. The prosecutor's hesitation regarding Green's ability to apply the law of causation constituted a reason for exercising the peremptory challenge which was both neutral and related to the case to be tried.

The prosecutor also explained that she had been concerned about whether Green would require the state to establish that Tompkins' acts were premeditated.

> When I got to the portion of my voir dire about premeditation on page 115 of the transcript, after I had given my explanation and examples and asked him if he would want me to show premeditation to him, he said I don't think so and then he said that's all I can say. I don't think so. I don't know and again the Judge interceded and explained it to him and committed him that he would not require me to show premeditation, so in my view he had flip flopped

[6]This portion of the jury charge mirrors the provisions of Tex. Penal Code § 6.04, which sets forth the law of causation.

> again on an answer to a question that was extremely important to our case.

(A. 12; B.H. 210-11). Again, the source of this concern is readily apparent in the record of the voir dire.

> Q. The law also says I don't have to prove to you there was any premeditation before an act was committed. I don't have to show that he sat and planned it for a couple of days before the offense was committed. Would you want me to show premeditation?
> A. I don't think so.
>
> Q. Now, I can understand when you don't think so, because you haven't heard any facts yet.
>
> A. That's all I can say: I don't think so. I don't know.

(A. 8-9; R. XVI 115-16). The prosecutor was entitled to exercise a peremptory challenge to exclude a venire member such as Green, whose responses indicated that he might improperly require the state to prove premeditation.

The prosecutor also stated that, as a consequence of the number of non-verbal or one-word responses which she got from Green, she "really didn't have a whole lot to base any evaluation on except to assume that he was not a very articulate person or didn't have any explanations or feelings that he was sharing with me" (A. 11; B.H. 210). A lack of responsiveness on the part of a venire member seriously hampers the prosecution's ability to assess that individual's qualifications for jury service, and thus constitutes a racially neutral reason for exclusion

which is related to the trial.[7] *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1038 n.14 (1984) ("Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. Any complicated voir dire calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal. Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible."); *United States v. Oregon Medical Society*, 343 U.S. 326, 339 (1952) quoted in *Maggio v. Fulford*, 462 U.S. 111, 118 (1983) and *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). ("Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth....

[7]In a number of cases, the courts have found that similar explanations for the exercise of peremptory challenges to exclude minorities did not reflect purposeful discrimination. *See United States v. Vaccarro*, 816 F.2d 443, 457 (9th Cir.), *cert. denied*, ___U.S. ___, 108 S.Ct. 295 (1987) (peremptory challenges based on profession and poor response during voir dire); *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987) (peremptory challenge to venire member who looked sullen and glared at prosecutor); *United States v. Forbes*, 816 F.2d 1006 (5th Cir. 1987) (the record does not remotely suggest that the peremptory challenge was based on race when exercised because hostility in posture and demeanor led the prosecutor to believe that the venire member might respond negatively to the government); *United States v. Cartlidge*, 808 F.2d 1064 (5th Cir. 1987) (peremptory challenge was permissible when explained by the fact that the challenged venire member avoided eye contact and that two of the next three jurors were desirable); *Lockett v. State* 517 So.2d 1346 (Miss. 1987) (prosecutor's peremptory challenges to minority venire members found not to violate *Batson* when explanations were given that they were excluded because youth and education level indicated instabililty and because demeanor suggested that they were unstable, unconcerned and had no respect for proceedings).

How can we say the judge is wrong? We never saw the witnesses . . . . ").

The determination of the trial court that the prosecution's peremptory challenge to Green was not racially motivated was properly based on the four reasons stated by the prosecutor. Each reason offered by the prosecutor was racially neutral and related to the case to be tried. The trial court's determination is supported by the record of both the voir dire and the *Batson* hearing and is fully consistent with the letter and spirit of *Batson*.

Despite the trial court's findings, the Court of Criminal Appeals concluded that Green was "peremptorily struck solely, by the testimony of the prosecuting attorney who testified on this point, because he had been an employee of the United States Postal Service for some thirteen years, and not simply because he was black" (J.A. 70-71). The conclusion reached by the court of appeals is incomprehensible in light of the explanations of the prosecutor which were credited by the trial court and the prosecutor's repeated testimony that Green's employment was not the basis for his exclusion. (B.H. 214, 215-16, 218.).

Viewed in context, it is apparent that the prosecutor's statement that she had not had luck with postal employees was more in the nature of a parenthetical comment than an asserted reason for excluding Green. In finding that Green was excluded solely on the basis of his type of employment, the Court of Criminal Appeals ignored the reasons actually advanced by the prosecutor as well as the findings of the trial court.

B. *The state's reason for exercising a peremptory challenge to exclude venire member Isabella Thomas was both racially neutral and related to legitimate trial considerations.*

The trial court found that venire member Thomas first stated that she could not follow the law of circumstantial evidence upon which the state relied for a conviction and although she later indicated that she would follow the law if so instructed by the court, the prosecutor used a peremptory challenge to exclude her because he was skeptical about her ability to follow the law. Based on this determination, the trial court again found that the challenge was "neutral, relative, clear and legitimate as required by *Batson*" (J.A. 48). The trial court's findings are fully supported by the record.

The prosecutor testified at the Batson hearing as follows:

> From the very beginning I thought very seriously about talking (sic) Isabella Thomas. I wanted her and she answered every question and I had a good feeling about her. ... I had a feeling from her answers [regarding the law of causation, the law of parties, reasonable doubt, the elements, conflict of testimony, motive] that I wanted this lady on my jury. Now, in fact, I went into the two questions, one and two, and I felt satisfied at that time and I think I must have left out the questions concerning circumstantial evidence because I came back and picked up and that's when we started having problems.

> Q. Why was the law of circumstantial evidence so important at that particular time?
>
> A. That was my whole case. We had no direct evidence. We had to connect Mr. Tompkins by circumstantial evidence, and when we put the work in we were able to follow each step that he took, but the person had to go along with circumstantial evidence and there are a lot of folks that if you don't have an eye witness they are not going to convict them.

(A. 20-21; B.H. 104, 105-06). The prosecutor's perception that Thomas had difficulty accepting the law of circumstantial evidence is readily apparent from the record of the voir dire (A. 15-16; R. XI 73-74).

Tompkins argues that the prosecutor's perception that Thomas might have trouble with the law of circumstantial evidence could not constitute a neutral explanation for the peremptory challenge because, as recognized by the Court of Criminal Appeals, at the time of the challenge Tompkins' confession had not been excluded. Given this state of the record, according to Tompkins, the prosecutor's explanation raised an inference of pretext, and the Court of Criminal Appeals erred in its determination that the law of circumstantial evidence remained relevant to the state's case even though the confession had not been suppressed.

This argument is without merit, for a number of reasons. First, Tompkins' argument relies on the erroneous assumption that a peremptory challenge cannot be determined to be racially neutral unless the prosecutor's reason for the challenge is articulated with such precision that it can be demonstrated upon

retrospective review to fully correspond with the record. As discussed *infra*, at 40-41, *Batson* requires only that the trial court assess the credibility of the neutral explanation asserted by the prosecutor in light of the facts and other relevant circumstances which the defendant argues show purposeful discrimination. Indeed, as stated above, *Batson* makes clear that the explanation for a peremptory challenge need not rise to the level necessary to justify a challenge for cause.

Even assuming *arguendo* that *Batson* imposes the exacting standard of review for which Tompkins argues, his claim nonetheless must fail. It is apparent from the record that both the state and the defense anticipated that the state's case would depend on circumstantial evidence. Throughout the lengthy voir dire, each side consistently questioned venire members regarding their ability to follow the law regarding circumstantial evidence.[8] That the prosecutor

[8]The following venire members were questioned regarding circumstantial evidence: Green (R. XV 117-18 (state)); Thomas (R. IX 72-77); Lawrie (R. VI 430-31 (state), 458 (defense)); Matuszewski (R. X 1271 (state)); Palmer (R. X 1307 (state), 1324 (defense)). Cowart (R. VII 96-97 (state)); Whitley (R. VII 174-75 (state)); Linn (R. VII 232-33 (state), 246-47 (defense)); Schmidt (R. VII 279-80 (state)); Wistert (R. VIII 316-19 (state), 342 (defense)); Morris (R. VIII 376-77 (state), 401-2 (defense)); Bitterman (R. VIII 508-9 (state)); Sumrall (R. VIII 572-73 (state)); Yetter (R. VIII 676-77 (state)); Darilek (R. X 781-82 (state)); Thacker (R. X 846-47 (state)); Desporte (R. X 898-99 (state), 920-21 (defense)); Sutphen (R. XI 969-70 (state)); Mayo (R. XI 1049-51 (state)) Hindelang (R. XI 1100-1 state)); Welborn (R. XII 1171-72 (state), 1186-88 (defense)); Turnbull (R. XIII 1351 (state)); Henry (R. XIII 1421-22 (state)); Vana (R. XIII 1459-60 (state), 1485-86 (defense)); Hollingsworth (R. XIII 1571-72 (state)); Prolaska (R. XIV 51-52 (state)); Gabel (R. XIV 118 (state)); Martin (R. XIV 153 (state)); Wright (R. XIV 200-01 (state), XV 10 (defense)); Miller (R. XV 50-51 (state)); Moore (R. XV 116-17 (state)); Carr (R. XV 165-66 (state), 195 (defense)); Lesiker (R. XV 223-24 (state)); Sutton (R. XV 2101-02 (state), 75 (defense)); Mick (R. XV 174-76 (state), 190-91 (defense)); Deming (R. XV 2261-63 (state)).

questioned both white and black venire members on the law of circumstantial evidence belies Tompkins' assertion that the prosecutor's stated reason for excluding Thomas was a pretext.

Moreover, the record demonstrates that the state's case against Tompkins was in fact based on circumstantial evidence regardless whether the confession was excluded. Even if the confession had been admitted into evidence, the state would have been forced to rely on circumstantial evidence to obtain a conviction. Nowhere in Tompkins' confession (J.A. 50-55) did he state that he intended to kill his victim. In order to prove Tompkins' murderous intent, as it was required to do to establish his guilt of the offense of capital murder, the state necessarily was forced to rely on circumstantial evidence.[9]

Further, and more important, it was reasonable for the prosecutor to anticipate that the confession might be suppressed at some point after the voir dire, as in fact happened. Under Texas law, the state is allowed to anticipate in voir dire the evidence as it might develop at trial and to qualify the jury on the law applicable to the various possible configurations. *DeMouchette v. State*, 731 S.W.2d 75, 81 (Tex. Crim. App. 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 75 (1987). That is precisely what took place in the instant case.

[9]Prior to the Court of Criminal Appeals' decision in *Hankins v. State*, 646 S.W.2d 191 (Tex. Crim. App. 1981), Texas law required a jury instruction on circumstantial evidence in cases where there was no direct evidence offered by the state. The relevant inquiry in this case is not whether such an instruction was required but whether the state's case was based, even in part, on circumstantial evidence, thus prompting the prosecutor's concern for selecting jurors who could convict on the basis of such evidence.

On April 13, 1981, the trial court held a hearing on Tompkins' motion to suppress the confession following which, on May 11, 1981, it denied the motion (R. VI 67). Tompkins' confession ultimately was suppressed on the basis of trial testimony elicited by the prosecution from a state's witness, Justice of the Peace Guy Herman. Judge Herman testified that during arraignment Tompkins requested an appointed attorney but that no attorney was appointed for him and no information regarding that request was given to the Houston Police Department (R. XXII 44-45). At the close of Judge Herman's testimony, the trial court held as follows:

> [I]n view of Judge Herman's testimony and in view of the Supreme Court's decision in *Edwards v. Arizona* returned on May 18, 1981, which is approximately a month after we had a *Jackson-Denno* hearing in this case, I will reverse my prior ruling regarding your *Jackson-Denno* hearing and the Motion to Suppress the written confession of the defendant is granted.

(R. XXII 56-57).

As the trial court noted, this Court's decision in *Edwards* was delivered on May 18, 1981, more than a month after the suppression hearing and one week after the trial court denied Tompkins' motion to suppress. The voir dire of Thomas took place on May 19, 1981, the day after *Edwards* was decided. While the prosecutor did not testify that he was aware of the *Edwards* decision at the time he questioned Thomas, he certainly was chargeable with the knowledge that the case was pending and that the issue before the *Edwards* Court might well be dispositive of Tompkins' motion to suppress. Thus, the prosecutor could reasonably have anticipated that defense counsel's

efforts to exclude the confession would not end with the pretrial hearing and that it might ultimately be suppressed at trial, as in fact happened.

C. *The state's reasons for exercising a peremptory challenge to exclude venire member Frank E. Samuel were both racially neutral and related to legitimate trial considerations.*

Following the *Batson* hearing, the trial court found that the state's peremptory challenge to venire member Samuel was based on the prosecutor's perception that Samuel would have great difficulty in understanding the legal concepts underlying a capital case. (J.A. 48-49). The court concluded that "the state's excusal of Samuel was neutral, relative, clear and legitimate as required by *Batson* and not racially motivated" (*Id.* at 49).

The trial court's conclusions are in full accord with the testimony of the prosecutor at the *Batson* hearing.

> Then when you look at the long form, your age, for example, I don't know whether he was forty-eight or forty-nine. I must admit sometimes I have problems when it comes to my age and I have to use my fingers, but he didn't know the month. It was either the tenth or the twelfth month, and by the way he writes, to me indicated that he had a hard time writing. If you go to if he was married, he answered that he lived in Harris County, Texas for thirty years. City and state of previous residence, he puts his address, 4422 Montrose, so he doesn't really answer the question. Your occupaton--well,

I am not sure, but that's either filler of some part, but it's o-r-d-a- and f-i-l-l-e-r.

(A. 34; B.H. 135-36).

If you go to number 13, he seems like he had a problem spelling Houston. If you go to line 15, he says he was in the military service and when he spells Army it's A-m-r-y. I am not the greatest speller in the world, but I can spell Army. If you go to 16 where it says religious preference, I assume he was going to put Baptist, but couldn't spell it and just put B. From that--and it was my opinion that this particular case was a very complex case. It had complex issues, and the last thing I wanted to do was put someone on there that would have been uncomfortable or I felt could not at least read the jury charge and have at least the ability to understand it, and what was going on and especially the issues that were involved, after seeing this, I just felt that I didn't want this person on that jury and mainly I really questioned his comprehension and if you have a hard time reading or writing I am not too sure on a serious case like this that I would want that kind of person on there, and that was my thinking, rightfully or wrongly, and, in fact, when I asked him the question I really did think in all honesty that the man couldn't even read and I did ask him to read . . . but even in that respect I was going to strike the man because of those reasons. I just didn't feel he could comprehend the issues or that he could read the charge and I made my mind up from the very beginning--probably when I saw the questionnaire.

(A. 36-37; B.H. 137-38). On cross-examination, defense counsel questioned the prosecutor about the fact that the record revealed that Samuel was able to read the two punishment phase questions:

A. Yes, it appeared that way.

Q. And you could see here that--

A. He had trouble, as I recall, but he got through it.

Q. That is not reflected in the record?

A. No, there is no way you could reflect that in the record.

Q. And you have specific recollections--

A. Yeah, I think that to be the case.

(B.H. 141-42).

Samuel's responses during voir dire revealed an apparent lack of understanding of the prosecutor's questions regarding, for example, whether he would require the defendant to take the stand and whether he would require the prosecutor to prove motive (A. 31-32; R. XVI 23-25). Although the questions made it clear that the defendant was not required to take the stand and that the prosecutor was not required to prove motive, Samuel initially responded to each question affirmatively (A. 31, 32; R. XVI 23, 25). When the prosecutor explained to Samuel a second time the requirements of the law regarding these issues, Samuel changed his answers to no (A. 32, 33; R. XVI 25-26). In short, the record shows that Samuel did not readily understand the inquiries of the prosecutor and

appeared to base his answers on what he thought the prosecutor was expecting of him.

Tompkins has not satisfied his burden of demonstrating that the peremptory challenge to Samuel reflected purposeful discrimination on the part of the prosecutor. The records of both the *Batson* hearing and the voir dire reflect the basis for the prosecutor's concern about Samuel's ability to grasp necessary legal issues. Moreover, an evaluation of a venire member's ability to understand and apply legal issues may be conveyed by a number of factors which are not fully reflected in the voir dire such as facial expressions or hesitation in answering questions. *See, e.g., Patton v. Yount*, 467 U.S. at 1038 n.14; *United States v. Oregon Medical Society*, 343 U.S. at 339. The peremptory challenge to Samuel is not improper under *Batson* simply by virtue of the fact that it relied to a degree on the prosecutor's intuitive response to factors which are not fully reflected in the voir dire, *e.g.*, the ease with which Samuel read the punishment questions.

D. *The trial court was not required to undertake a sua sponte review of the entire voir dire before determining whether the prosecutor's explanations for the peremptory strikes were neutral and related to the case to be tried.*

Under *Batson*, the trial court is required to make two distinct determinations. First, it must determine whether the defendant has demonstrated that the circumstances concerning the prosecutor's use of peremptory challenges establish a prima facie case of discrimination against minority venire members. Second, after the prosecutor has articulated a neutral reason which is related to the particular case, the trial court must determine "if the defendant has established

purposeful discrimination." *Batson*, 476 U.S. at ___, 106 S. Ct. at 1723-24 (emphasis added). With respect to this final determination, *Batson* mandates only that the court evaluate the credibility of the proffered explanation in light of the defendant's evidence of discriminatory exercise of peremptory challenges.[10]

1. The court of appeals properly refused to consider matters which were not presented to the trial court.

In the retrospective *Batson* hearing, Tompkins made no attempt to introduce any evidence comparing minority venire members who were challenged with white venire members who were not challenged, evidence which he now claims demonstrates the pretextual nature of the prosecutors' explanations. By asking this Court and the court of appeals below to review the trial court's factual findings based on

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[10]The Sixth and Seventh Circuits have held that adversarial proceedings are not generally required for a valid *Batson* determination except where the trial court determines that fundamental fairness requires rebuttal and participation by the defendant in the "neutral explanation" phase of the proceeding. *United States v. Davis*, 809 F.2d 1194, 1201-02 (6th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 3234-35 (1987) (defendants not present at *in camera* proceeding to determine whether peremptory challenges were racially motivated); *accord, United States v. Tucker*, 836 F.2d 334 (7th Cir. 1987); *but see United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987) (defendants entitled to in-court hearing except where compelling reasons militate against such procedure) and *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir. 1988) (same); *see also United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988) (defendant not entitled to examine prosecutor at *Batson* hearing) and *State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988), *cert. pending*, ___ U.S. ___, No. 88-5159 (1988) (same).

evidence which was not presented to that court, Tompkins seeks to thwart the orderly administration of justice and flout settled principles of appellate review. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983) (Court will not decide questions not raised in or decided by the court below). In order for the data offered by Tompkins to have been properly before the state appellate court, it would have had to have been presented to the trial court.

2. The procedure urged by *amici* is in conflict with *Batson*.

Both *amicus* briefs argue that in the context of a retrospective *Batson* determination, as was held here, it is incumbent upon the trial court to review the record of the entire voir dire and trial before determining that the prosecutor's explanation is neutral and not a pretext for racial discrimination (ACLU Am.Br. 24; LCCR Am.Br. 12-13).[11] Specifically, it is urged that the trial court must conduct a comparative analysis of appropriate portions of the voir dire to determine whether "(a) minority venire members were stricken, while similarly situated white venire persons escaped challenge; (b) the voir dire of minority venire members appeared designed to elicit a particular response, and similar examination was not undertaken of white venire persons, (c) the challenged venire person was examined in a perfunctory manner, if at all; and (d) the explanation of the State was not logically related to the elements of the offense" (LCCR Am.Br. 12-13; *see also* ACLU Am.Br. 24).

[11]"ACLU Am.Br." refers to the amicus brief filed by the American Civil Liberties Union; "LCCR Am.Br." refers to the amicus brief of the Lawyers' Committee for Civil Rights under Law.

There is no support for the assertion that such an inquiry on the part of the trial court is constitutionally mandated by either the substantive considerations or the procedural guidelines articulating the burdens of proof and persuasion set forth in *Batson*. Further, the analysis and comparisons which *amici* assert must be undertaken by the trial court would reveal precisely those facts and circumstances which a defendant bears the burden of producing in establishing a prima facie case. In *Batson*, the Court set forth three factors which establish a prima facie case of purposeful discrimination in the selection of the petit jury and held that in determining the third factor, whether an inference had been raised that the prosecutor used peremptory challenges to exclude venire members from the jury on account of their race, "the trial court should consider all relevant circumstances." *Id.* at ___, 106 S. Ct. at 1723. The Court further set forth examples of circumstances which would raise the necessary inference. *Id.* To the extent *Batson* contemplates the sort of comparative analysis urged by *amici*, such would be appropriate only with regard to the initial inquiry whether a prima facie case has been established. Thereafter, the proper focus is on the reasonableness of the prosecutor's explanations in light of all the information then available.

In addition, the procedure urged by *amici* flies in the face of *Batson*, which contemplates that the prosecutor will state the reasons for his peremptory strikes contemporaneously with the voir dire. Here, the *Batson* hearing was held retroactively, some six years after trial. Now that *Batson* is the law of the land, such hearings necessarily are held during the course of voir dire, in which case the trial court does not have the benefit of a trial transcript in making its

determinations. Under these circumstances, the inquiry suggested by *amici* would require that voir dire be interrupted whenever a *Batson* issue is raised so that the court reporter could prepare a transcript in order that the trial court could conduct a comparative analysis. The Constitution does not mandate such a cumbersome procedure.

Finally, while the *Batson* Court declined to formulate particular procedures to be followed by the trial court for determining whether peremptory challenges are racially motivated, the procedure proposed by the *amici* is foreclosed by the Court's adoption of the burden of proof rules developed in the context of Title VII "disparate treatment" actions. *Batson*, 476 U.S. at ___ n. 18, 106 S.Ct. at 1721, *citing Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *see also Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984). Under these rules the ultimate burden of persuasion lies with and never shifts from the defendant. Thus, the proposition set forth by the *amici*, that in effect imposes a duty on the trial court to assist the defendant in satisfying his burden of proof, is in direct conflict with *Batson*. *Batson* does not provide for further inquiries or proceedings after the state offers its neutral explanation. Even in those instances where the trial court believes that fundamental fairness requires that the defendant be given the opportunity to rebut the explanation, it is the burden of the defendant, not the trial court, to demonstrate that the explanation is a pretext for purposeful discrimination. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253 (should the defendant in a Title VII case carry his burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext

for discrimination); *State v. Antwine*, 743 S.W.2d 51, 64 (1988) (defendant has the obligation to demonstrate that the state's explanations are merely pretextual and, thus, not the true reason for the use of the state's peremptory challenges).[12]

3. Had the trial court made the comparison urged by Tompkins, his claim nonetheless would fail.

Underlying the claims asserted by Tompkins and the *amici* is the unproven assumption that the trial court did not undertake the review which they claim is constitutionally mandated. The only apparent support for this assumption is their apprehension that, had such review been undertaken, the peremptory challenges would have been found impermissible under *Batson*, and that because the trial court reached a different conclusion from that which they would have had it reach, it necessarily did not conduct the desired review. While the Constitution does not require the trial court to undertake the inquiries delineated by the *amici*, even were such inquiries constitutionally mandated, it is clear that the comparison evidence which Tompkins asserts would have been uncovered would

[12]The *amici* assert that, as a consequence of the reference to *Anderson v. Bessemer* City, 470 U.S. 564 (1985), in footnote 21 of the *Batson* opinion, *Batson* must be viewed as incorporating a "clearly erroneous" standard of review under which the Court of Appeals was required to review the entire record before deferring to the determinations of the trial court. Because the opinion of Texas Court of Criminal Appeals explicitly states that the entire voir dire was reviewed on appeal (J.A. 71), this assertion is without import. Moreover, as demonstrated *infra*, the determination of the trial court that the peremptory challenges were not racially motivated would be entitled to deference under either the "clearly erroneous" standard of review or the "rational basis" standard purportedly applied by the Court of Criminal Appeals.

not have demonstrated that the prosecutor's explanations were a pretext for purposeful discrimination.

Tompkins alleges that the prosecution's stated reason that he struck Isabella Thompson for her inability to apply the law of circumstantial evidence was mere pretext. For example, Tompkins calls attention to the fact that various venire members who were selected as jurors had experienced difficulty understanding certain points of law during the voir dire. While the jurors alluded to by Tompkins apparently had difficulty understanding some of the principles of law put to them, they also stated without reservation that they could in fact apply the law once it had been adequately explained. *E.g.*, Hollingsworth (R. XIII 1553); Wistert (R. VIII 314); Moore (R. XV 1910-11); Demming (R. XV 2263).

Thomas, on the other hand, had difficulties which went beyond a mere failure to fully grasp a legal concept. She was simply noncommital as to whether she could apply the law as she understood it and find a person guilty of capital murder in the absence of direct evidence. This hesitancy to apply standing law would understandably create doubt regarding a venireman's potential as a juror and was the critical factor which led to the prosecutor's decision to exclude Thomas, even though he initially had been predisposed to accepting her as a juror on the basis of her age and work experience (A. 20; B.H. 104). The record refutes the assertion that Thomas was as acceptable to the state as white venire members who were not excluded.

Finally, Tompkins argues that the prosecutor's reasons for striking Leroy Green are superficial but cites only a few of the several reasons enumerated by the prosecution culminating in its decision to excuse Green. As discussed, *supra*, at 22-29, the prosecutor

offered four separate considerations which led her to exclude Green. Green's voir dire indicated that he was less than a reliable juror, leading the prosecutor to find "it looks like from his answers or lack of answers that I wouldn't have wanted him." (A. 13; B.H. 212).

Though Tompkins alludes to petit jurors who may have shared a single commonality with Green, none of the accepted jurors proved to have as many attributes which were, from the prosecutor's perception, decisively negative. Those accepted jurors who may have responded nonverbally at one time or another, like Green, also demonstrated overriding qualities which might be viewed as desirable in potential jurors. *E.g.*, Carol Moore: as a mother of two children she has experience assessing truthfulness (R. XV 110-11); Sharon Miller: willing to forego beginning school for certification in order to fulfill duty as a juror; also, had been a victim of a crime on more than one occasion (R. XV 35-36, 66); William Wright: demonstrated no difficulty with legal principles or any inherent bias (R. XIV 1753-85); Katherine Yetter: followed each point of law without question or confusion and answered questions without reservation (R. IX 643-81); Curtis Sumrall: had been a victim of a crime and followed legal principles and answered questions without reservation (R. IX 575, 551-88); Denean Hollingsworth: demonstrated understanding of legal principles and willingness to follow the law objectively (R. XIII 538-79); Patricia Ahuero: her mother had been the victim of a crime and she had prior jury service (R. XVII 167, 168); Peggy Whitley: had been a victim of a crime (R. VII 188); Charles Vana: had prior jury experience (R. XIII 1476). Moreover, even though petit juror Sumrall's wife was a postal employee as were Green and his wife, the prosecutor made clear that Green's employment was, at the most, only a contributing factor in her decision to

exclude Green. Finally, none of the petit jurors cited by Tompkins as similar to Green shared his inconsistent attitude toward the death penalty, his inability to follow the law of causation or his difficulty with the concept of premeditation. The record clearly demonstrates that the prosecution had substantive, neutral cause for peremptorily striking Leroy Green.

E. *The record refutes any assertion that the prosecutor's strikes were based even in part on considerations of race.*

1. *Batson* forbids only peremptory challenges made solely on the basis of race.

The *amicus* Lawyer's Committee argues that the Texas Court of Criminal Appeals incorrectly interpreted *Batson* to sanction peremptory strikes that are in part racially motivated (LCCR Am.Br. 6-9). Because there is no evidence that the peremptory challenges were even in part racially motivated, this argument is of no import. Moreover, the insubstantiality of this argument is revealed by a comparison of *Batson* and the opinion of the court below, which reveals "practically identical" language, as *amicus* concedes (LCCR Am.Br. 7 n.2). *Amicus* finds fault with the conclusion of the court of appeals that no constitutional violation had occurred because the trial judge "found, implicitly, that the prosecuting attorneys did not exercise their peremptories against the five black venirepersons complained about solely on account of their race or on the assumption that black jurors as a group would be unable impartially to consider the state's case against appellant." (J.A. 62). The language of the court below is fully consistent with *Batson*, in which the Court stated:

> [T]he equal protection clause forbids ... the states to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection ... would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise *solely* from the juror's race."

Batson, 476 U.S. at ___ 106 S.Ct. at 1723 (emphasis added).

Amicus asserts that the conclusion that Batson requires totally non-racial explanations "is inescapable in light of this Court's repeated rejection of mixed-motive explanations in other contexts" (LCCR Am.Br. 8). *Amicus*' reliance on *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), is misplaced. The Court in *Arlington Heights* merely held that the judicial deference which normally precludes judicial scrutiny of legislative or administrative acts is no longer justified when there is *proof* of a discriminatory purpose. *Id.* at 265; *see also Washington v. Davis*, 426 U.S. 229, 243 (1976) (legitimate purposes behind challenged actions are not open to impeachment by evidence that they were actually racially motivated). Here, the record is devoid of proof of discriminatory intent.

2. There is no evidence of a prosecutorial policy to exclude minority venire members.

Any assertion that the Harris County District Attorney's Office had a formal practice of excluding venire members on the basis of race was clearly refuted by former district attorney Robert Moen, who testified *on Tompkins' behalf* during the *Batson* hearing. When

asked about the existence of such a "policy," Moen responded:

> Let me clear up something first of all, if I can, and that is that policy is not my word because I really want to say that I served under Carol Vance and Johnny Holmes and I am stating for the record at no time have either one of those District Attorneys of Harris County, Texas ever had such a policy and stated such a policy for all the members of the District Attorney's Office to follow.

(B.H. 34). That it was neither the policy nor practice of Harris County prosecutors to exclude blacks as a matter of course is further demonstrated by Moen's unimpeached testimony that in about half of the capital cases he had tried the juries were composed of both black and white members, with as many as three or four blacks on a given jury (B.H. 20-22). Moen acknowledged that he would look at the race of the venire members on the general information sheet, but that his selection decision "would depend, obviously, on your individual questions and listening to the individual questioning of the defense" (B.H. 28-29). Race was merely a factor which would enter his decision-making process (B.H. 33).

Moen further testified that considerations of race in jury selection during his tenure as a prosecutor stemmed from a particular incident of racial tension which took place in Harris County in the early 1970's and contributed to poor relations between the police and the minority community. According to Moen, this situation was not as acute in 1981 (B.H. 35). Thus, contrary to *amicus*' assertions, the record demonstrates that there never has been such a policy in the Harris County District Attorney's Office. *Compare Batson*,

476 U.S. at ___ & n.3, 106 S. Ct. at 1727 & n.3 (MARSHALL, J., concurring) (instruction book allegedly used by Dallas County, Texas District Attorney's Office explicitly advised prosecutors to exclude minority members). Because there is absolutely no evidence that such a policy existed in Harris County, and, thus, no proof of discriminatory intent, this is not a case in which the Court should give less than full deference to the testimony of the prosecutor and the findings of the trial court.

In conclusion, this is not a case in which there can be any doubt as to the motivation for the prosecution's exercise of peremptory challenges. The findings of the trial court, which are firmly grounded in the record, refute any notion that the challenges were made on the basis of the venire members' race or ethnic origin. *Batson* does not require that the explanations for peremptory challenges be sufficient to support a challenge for cause--only that they be rational and based on considerations other than race. In any event, regardless of the standard the Court employs, the record in the case at bar simply does not bear out Tompkins' factual assertions. There was no violation of *Batson*.

CONCLUSION

For the above reasons, the state respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

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APPENDIX A

Relevant Portions of Voir Dire of Leroy Green

Now, you know that you were asked about your feelings on the death penalty, and I believe you indicated to her that you had no objection to it; is that correct?

A Yes, ma'am.

Q Have you always felt that way?

A Well, I don't know. I guess so. But then, again, it's like you said: Sometimes I felt that way and sometimes I didn't.

Q Have you ever had any discussions with other people about the death penalty?

A No.

Q Is this something you just thought about yourself?

A (Juror nods heads.)

Q Does your wife have any feelings about the death penalty, that you know of?

A I don't think she favors it too much.

Q So she would be against the death penalty; is that correct?

A In the conversations that I have heard her stated, I think.

Q But you don't feel that way?

A (Juror shakes head.)

Q Would it bother you to any extent to be a juror that renders a guilty verdict in a capitol murder case and participate in the punishment portion, knowing that your verdict in the punishment phase would require the Judge, or the Court, to assess the death penalty?

A You say: Would it bother me to participate?

Q Yes sir.

A I don't know if it'd bother me to participate. I don't know if it bothered me if I assess it. I haven't been through that thing; so I can't say what I would feel afterward.

(R. XVI 100-02).

* * * * *

Q For instance, if the robber goes into the bank and he has the gun with no bullets but he is going to use it and threaten the person into giving him the money and he goes up to the teller with that gun and points it at the teller and says, "This is a holdup; give me you money," and the security guard overhears the bank robbery and he pulls his gun and fires at the robber and he misses and hits an innocent person and kills that innocent person, the law says that the bank robber is the one

who can be charged with capital murder of that innocent person, because during the course of the bank robbery, another offense was committed. And the law says when you put something into motion, you are going to be responsible for the results. So even though the bank robber didn't shoot the innocent person, he can be charged with capital murder and found guilty of capital murder of that innocent bystander. That's what is called the law of causation.

Now, in a proper case--in a capital murder--would you be able to use and follow the law of causation in finding a defendant guilty?

A I believe I might have a little trouble with that.

Q You might have some trouble with it. Do you agree with the law of causation?

MR. JONES: I object to the question. It isn't whether he agrees; whether he can follow the law.

THE COURT: Sustained.

Mr. Green, what she is trying to find out is if the Court tells you that's what the law is in the Court's charge-- and believe me, it will be lots more complicated than the way she put it.

THE COURT: It is kind of complicated. But you could follow that if the Court told you that was what the law was?

JUROR GREEN: I could follow it.

THE COURT: Down the line you might want to take that into consideration when you are trying to deal with the fellow, but the law supplies that in getting from here to there. It says if you do something that is illegal, to begin with, then you are responsible for whatever else happens as a result of what you did, the idea being that if that fellow hadn't gone in in the first place, nothing would have happened.

JUROR GREEN: I understand.

THE COURT: Fine.

QUESTIONS BY MRS. DAVENPORT:

Q The law also furnishes us with what is known as the law of parties.

A Repeat?

Q The law of parties. That is when, say, at least two people went in that bank together and planned that bank robbery and one of them was going to be the one standing there holding the gun and the other one scooping up the money. Okay. They have already done that and they are trying to make their getaway. And the one with the gun turns around and shoots somebody that he thinks is going to try to stop them, and they make their getaway. And there is another person out in the car who was just driving the car, waiting for these two that went in the bank and came

out. The law says under the law of parties the man who did the shootings and the man who did the scooping up of the money and the man who drove the car can all three be charged with capital murder and found guilty of capital murder. Now, in a proper capital murder case, would you be able to follow and apply the law of parties?

A Yeah.

Q The burden of proof that the State must meet in a criminal case is called beyond a reasonable doubt. Now, we say "beyond a reasonable doubt." And I wish I could give you a definition for that, but lawyers haven't all agreed on it; so we don't have a definition. It's the definition of what you put on what that means. I submit to you that it does not mean we have to prove it to you beyond all doubt. We don't have to convince you one hundred percent, because I doubt if I could convince you of anything one hundred percent. You would always think in the back of your mind somewhere or "maybe" or "I'm not quite sure about this," but that doesn't mean I haven't proved it to you beyond a reasonable doubt. The law presumes there is going to be some doubt because you have to base your verdict on what witnesses testify to up here on the stand. And when you hear from more than one person, you have two or more people testifying about the same thing, you are going to hear some conflicts in the testimony, because people don't see things the same or remember details the same.

So you have to listen to the testimony and try to decide who is telling the truth and who you can believe and how much you can believe. So can you see that there is going to be some doubt when you get through hearing from all the witnesses?

A (Juror nods head.)

Q The law says I must prove to you beyond a reasonable doubt each one of these elements back here in the indictment. Now, if you have some doubt about what he was wearing or something like that, then the law says that doesn't matter, you can just discard that. What I have to prove to you: that he was committing robbery or kidnapping and murder on a certain date in Harris County, Texas. The law also says that my burden does not increase with the severity of the crime; so just because we are talking about capital murder doesn't mean my burden of proof to you is any greater than if we were talking about a marijuana case or a traffic ticket. It's still beyond a reasonable doubt. And the only kind of guideline I can give you is just to use your common sense. Do you have any questions about "reasonable doubt"?

A No.

Q Would you hold me to any greater burden than beyond a reasonable doubt?

A (Juror shakes head.)

THE COURT: Mr. Green, because she has to take down everything all of us say, if you just shake your head and she happens not to be looking, then she misses it.

Q Now, the defendant has certain constitutional rights to protect him when he comes into a courtroom. One of those rights says that he is presumed to be innocent until the State has proved him guilty beyond a reasonable doubt. Now, this is a presumption of innocence. But my question to you is: Can you afford him that presumption right now without hearing any of the evidence or any of the testimony in this case? Would you presume right now that he is innocent as he is sitting there?

A Yeah.

Q Another one of his rights is that he doesn't have to take the stand and testify if he doesn't want to. And I can't call him to testify. I don't have that right. But after the State puts on their case and we bring you the witnesses that we can bring you and you hear all of our evidence, if he doesn't want to testify, if you believe the evidence we brought you, would you be able to find him guilty?

A Yes, if I believed.

Q Yes, sir. If we put on our case and you weren't convinced beyond a reasonable doubt that he is not guilty--

THE COURT: Double negative in there.

QUESTIONS BY MRS. DAVENPORT:

Q If we don't prove to you that he is guilty and you haven't heard from him, would you want to hear his side of the evidence before you found him not guilty?

A Not necessarily.

Q The law says we don't have to prove to you a person's motive. I don't have to prove to you why Phillip Tompkins would have done what we charged he had done, because I can't prove someone's motive. That's an impossible burden on us: to try to prove to you why a person did something. We can show you he did so intentionally; but we can't tell you why, because often a person doesn't even know why he did a particular thing. Would you want me to prove motive to you so much that you wouldn't be able to find a person guilty without knowing why he did something?

A No.

Q The law also says I don't have to prove to you there was any premeditation before an act was committed. I don't have to show that he sat and planned it for a couple of days before the offense was committed. Would you want me to show you any type of premeditation?

A I don't think so.

Q Now, I can understand when you don't think so, because you haven't heard any facts yet.

A That's all I can say: I don't think so. I don't know.

THE COURT: What she is getting at, Mr. Green, is although it is completely normal to say "I don't think" or "I believe so," everybody says that. In courtrooms it makes lawyers nervous. And what she is trying to ask you to do is to give her a yes or no answer. That's all that she was trying to ask for there.

QUESTIONS BY MRS. DAVENPORT:

Q So would that be a yes or no?

THE COURT: Run the question by him again.

A I think I am nervous.

THE COURT: I imagine you are. If you weren't nervous, Mr. Green, you would be the first person that ever sat on that chair that wasn't nervous.

A Would you repeat?

QUESTIONS BY MRS. DAVENPORT:

Q Would you require me to show you some premeditation on his part before you could find him guilty?

A No.

Q Thank you.

(R. XVI 108-17).

Prosecutor's Reason for Peremptory Strike of Leroy Green

Q You were the one who actually conducted the examination of that particular venireman. Is that right?

A Yes.

Q And would you please tell the Court the reasons--your reasons for not wanting that particular juror or that venireman?

A Okay, may I preface that by saying having read Mr. Green's transcript, which is basically my transcript, because I did a heck of a lot more talking than he did, I could tell from questions I asked and answers that I got why I would not want him on the jury, and from reviewing that, actually from remembering what Leroy Green looks like, but as I went through this and from his jury information card and the page that he filled out, I noticed that he had two years of college but had worked for thirteen and a half years as a messenger for the U.S. Postal Service which, if nothing else, in his favor or against him, is kind of an alert to me, because I have not had very good luck with postal employees and in his answer on voir dire it would indicate to me he

would not make a good juror. I noticed his wife also worked for the Post Office and I had that circled on that juror card. During the questioning, he indicated he used to be opposed to the death penalty. Sometimes he is opposed and sometimes not, and he flip flopped throughout the years. He apparently has no strong feelings one way or the other, which was a concern to me. He also indicated his wife opposed the death penalty, and as I went through the questions I asked him prefaced by examples and explanations that were quite lengthy, the report indicates that I got two nods as answers, indicating he was shaking his head up and down. The record also indicates that I got three shakes of the head indicating a no answer. He answered yeah three different times. He answered I guess once and he answered uh-huh twice, which indicates to me that I was not getting very good responses from him in answer to my questions, so based upon those eleven different answers with either shakes, nods, yeah, I guess or uh-huh, I really didn't have a whole lot to base any evaluation on except to assume that he was not a very articulate person or didn't have any explanations or feelings that he was sharing with me. When I got to the point in my voir dire about causation, that was on page 109 of the transcript, he indicated that quote, I believe I might have a little trouble with that, and at that point I believe the transcript shows that the Judge interceded and had a conversation with him explaining it a

little further and in response to the Judge's explanation he flip flopped and decided that he wouldn't have a problem with it, so that was a concern to me because causation was one of the issues that we felt we would be touching on in this case. When I got to the portion of my voir dire about premeditation on page 115 of the transcript, after I had given my explanation and examples and asked him if he would want me to show premeditation to him, he said I don't think so and then he said that's all I can say. I don't think so. I don't know, and again the Judge interceded and explained it to him and committed him that he would not require me to show premeditation, so in my view he had flip flopped again on an answer to a question that was extremely important to our case. Another problem, from reviewing the transcript on page 124, when I was trying to find out how he felt about probability--a definition of probability in the punishment questions, and after I gave him definitions and examples and I asked him how he would define probability, he answered: I really don't know, so at that point I felt like I didn't have a very deep thinking person or someone who was very interested enough to even come up with a definition, and on page 125 of the transcript when I was explaining a continuing threat to society and I had gone through my explanation and examples of what that would be and I asked him--before I even asked him the question it states in the transcript that I said: is there anything about question

number two that is bothering you? I believe if you check them all, I didn't normally ask that. Before I even asked him the question, which indicated to me that either his response--his facial expressions were one of puzzlement or uncomfortable or hostility or something that indicated to me that he was in disagreement about it and then I went on to ask the question and I think it's when I was asking him about his feelings about police officers, since he had indicated he had a friend named Deputy McDuffy, that I did not finish that line of questioning. Of course, the record doesn't indicate any pause or time in there before Mr. Royce moved to strike that juror, but I'm sure that we must have had a conversation about it or talked bout it as we did about each juror before we made a decision on whether to move for a strike or to pass them to the defense to let them voir dire. I don't remember what was said during that conversation, but it looks like from his answers or lack of answers that I wouldn't have wanted him. Even just reading a cold record, I wouldn't have wanted him on the jury, and I am sure Mr. Royce, who was sitting there watching him and listening to his answers, felt the same way.

Q Did you all move to strike this juror simply because he was black?

A No, sir.

MR. PEREZ: I will pass the witness, Your Honor.

(B.H. 208-12).

Relevant Portions of Voir Dire of Isabella Thomas

Q Okay. Good enough. There are two types of evidence in a criminal case: Direct and circumstantial. Let's say direct. Let's say someone comes up to you and beats you over the head and I see that and I'm called to testify in your behalf and I testify as to what happened. "Oh, Mr. Dove came up to you and beat you over the head and took your purse." That's what we call an example of direct evidence. Someone saw that person commit the crime against you.

Now, we have what we call circumstantial evidence; that is, we don't have direct evidence. We don't have no eye witnesses that say the crime. We must accumulate the facts and come to a reasonable conclusion that whoever is charged committed that crime.

Someone breaks into your house, no one saw them break in and no one saw them leave, but that person is caught either with your car or your property a couple of days later or maybe an hour later. From that set of facts, one could conclude, from taking all the facts together even though no one saw that person break in or leave your house, that that person that burglarized your house, broke into it, and stole your property, you see what I am saying.

A I understand.

Q My question to you is in the proper case can you apply the law of circumstantial evidence in a capital murder case? Can you find someone guilty of capital murder based on what we call -- you know, we have got to put a label on everything -- not direct evidence, but circumstantial evidence.

A I don't think so.

THE COURT: Let's see that we understand each other, like what we are talking about here. Of course, that circumstantial evidence has got to prove to you that it happened beyond a reasonable doubt, because if they didn't prove it to you that it happened beyond a reasonable doubt, then you would have to find the fellow not guilty; understand what I am getting at here?

THE VENIREMEN: Be all circumstantial, but it would be enough to prove, to convince me beyond a reasonable doubt? Okay, I am good at doing things when it comes straight out, but I don't know about the circumstantial.

THE COURT: Well, that's kind of one of those things - we are not trying to change your mind about something, but it's one of those things these lawyers are entitled to know, and you are the only person that can tell us that. I can't guess what is in your mind. It's kind of like if your kid comes in and he has got cookie

crumbs all over his face, you heard a crash and you found the cookie jar on the floor. You pretty well know he has been eating the cookies, but that is all circumstantial evidence. Nobody saw him get into the cookie jar.

THE VENIREMEN: I would understand that and that I would understand. I don't know.

MR. ROYCE: May I ask another question?

THE COURT: Yes sir, you may.

Q (Mr. Royce) Will you agree with me that capital murder is probably the most or is the most severe crime that one can commit in our society.

A Yes, it is.

Q Before you could find someone guilty of capital murder, in order for you to do so, would you have to have an eye witness to the crime yourself, before you could render that verdict of guilty? Would you require the State to prove or bring forth an eye witness, someone who actually saw the crime.

A I don't know. Not possible. But I guess it would be kind of -- I don't know -- it would be kind of hard for me -- I don't know. Kind of got me on that one.

THE COURT: Mrs. Thomas, I don't want to put the heavy on you. It's kind of

one of those things that he has got to have an answer to. Remember when we started I gave you a possession or someone charged with marijuana. I think we have talked to so many people that we loose tract of ourselves.

Let me give you an example: If someone is charged with possession of marijuana and they smoked a joint, so to speak, and they are going to be tried for it, and someone is asked, can you follow the law of possession of marijuana -- I know it is a simple example. Someone asked can you follow the law of possession of marijuana and I say no because -- I just don't like it. I think maybe marijuana should be made legal -- I just don't like that law. It doesn't mean I am not a law abiding citizen, or can't follow the law, but my principals are such that I don't like it and I couldn't apply the law to the facts regardless of what was shown to me. I changed my mind and then evidence is presented and the person is shown beyond a reasonable doubt that he did possess marijuana and I know it. The evidence shows it. But because my feelings are such, whether religious or moral or something deep down inside, I couldn't apply that law to the facts and I find the person not guilty or I can't make a decision because of my beliefs.

Q (Mr. Royce) There's nothing wrong with saying yes or no to any of these questions. It's just that we must put you in a position where we get a yes or no answer, and I

know it's difficult. And like the judge has said, only you know your true feelings; I don't. And you can't go in and say one minute yes and one minute no and it's difficult I know, because no one warned you that you were going to be subjected to the type of questions that we have asked you. And it's difficult for anybody, especially if you haven't had time to think it through and unfortunately, we don't have a lot of time. And so when I ask, you know, in a proper case would you require the State to bring you an eye witness and bring to you and say "yeah, I saw him do it", before you could enter a verdict of guilty.

A Well, I know it's not possible to bring an eye witness to the cases that come up. So you have to use whatever evidences that you have and prove it to the best of your ability.

Q That's right. My question to you, can you use or apply circumstantial evidence or the fact that you don't have any eye witness or you don't have any direct testimony? Can you apply that and arrive at whether or not a person is guilty or not guilty? Can you sit in judgment of another human being by applying and finding him guilty if it is proven to you beyond a reasonable doubt. Can you apply that law?

A I don't think so.

THE COURT: Mrs. Thomas. I don't think so, ain't going to do it, because I

guarantee you in a few minutes Mr. Jones over there is going to be asking you about the same thing from the other side of the coin. And nobody is trying to make you decide one way or another. I mean, we don't care, which way you decide. We have got to make you decide it, but we don't care which way you decide.

THE VENIREMEN: Well, this is my first time coming to jury duty.

THE COURT: We realize that. We realize that this is a different sort of thing. Somebody out of a clear blue sky and what he is asking you, it is this simple: If he proves his case to you beyond a reasonable doubt. Could you find the defendant guilty in any case based on circumstantial evidence or would you always require direct evidence before you could find somebody guilty.

THE VENIREMEN: I am sure if I was shown all of the possibilities of beyond a reasonable doubt, I could.

Q (Mr. Royce) I guess we use terms and then you use terms and we all get confused. Is that when you say, I only have one burden. I don't have a bunch of burdens. I have one that I must prove each and every element in that offense. You see what I am getting at is that if you got a speeding ticket, it's my burden to prove to you the elements that would be in that particular charge, what charged him with the crime. I must show you the date that it happened

on, the jurisdiction -- in our case robbery. I must prove either/or the kidnapping and the intent to cause death.

Now, one of the tools so to speak in doing that, the law of circumstantial evidence. And you are saying that you can apply that law to a given set of facts.

A Yes I could.

(R. XI 72-78).

Prosecutor's Reason for Peremptory Strike of Isabella Thomas

A From the very beginning I thought very seriously about taking Isabella Thomas. I wanted her and she answered every question and I had a good feeling about her. I mean I thought we related well to her. She was forty-five years of age, She had worked -- she was employed as a head cashier at Watson Center. As it turned out, she had been robbed a couple of times. She had worked there for twelve years. Before that she was employed with a private home for five years. I remember that I liked this lady. To me there was some credibility to her. The questions and the answers she gave I liked. She wasn't highly educated. To me that didn't make any difference at all. It's that I thought she had enough years on her that she would not tolerate what Mr. Tompkins did under any circumstances and I felt that she could give the death penalty. Now, I was concerned over certain areas of our

laws. One was the law of causation, and I felt that she could follow the law of causation. The law of parties, she could follow the law of parties, and I sincerely believe she could do so if called upon and I went through the whole thing -- beyond a reasonable doubt, the elements that, if we missed one -- if we didn't develop one what she could do and things of that nature. The conflicts of testimony. I went through motive and she answered, in my opinion -- she gave me what I wanted, and I had a feeling from her answers that I wanted this lady on my jury. Now, in fact, I went into the two questions, one and two, and I felt satisfied at that time and I think I must have left out the questions concerning circumstantial evidence because I came back and picked up and that's when we started having some problems.

Q (By Mr. Perez) Why was the law of circumstantial evidence so important at that particular time?

A That was my whole case. We had no direct evidence. We had to connect Mr. Tompkins by circumstantial evidence, and when we put the work in we were able to follow each step that he took, but the person had to go along with circumstantial evidence and there are a lot of folks that if you don't have an eye witness they are not going to convict them. That's just the way they think, and there is nothing wrong with it, and I had to make sure that this lady could follow that particular law and that was my case. It was one of circum-

stantial evidence, and so when we got down to asking her that -- and I think very honestly she answered the questions the best she could and, if I might, on page 1006 I asked her: my question to you is, in the proper case, can you apply the law of circumstantial evidence in a capital murder case? Can you find someone guilty of capital murder based on what we call -- you know, we have got to put a label on everything -- not direct evidence, but circumstantial evidence, and the Court said: if he proved it to you beyond a reasonable doubt, Mrs. Thomas. Her reply was: I don't think so. The Court said: let's see that we understand each other. Like what we talked about there, that circumstantial evidence has got to prove to you that it happened beyond a reasonable doubt because if they didn't prove it to you, then you would have to find the fella not guilty. Do you understand what I am getting at there? The prospective juror, Mrs. Thomas, said it's all circumstances, but it was enough to convince me beyond a reasonable doubt. I can do those things, when it comes straight out, but don't know about the circumstantial. On page 1007, the Court said: well -- excuse me 1006, line 23, the Court said: well, that's kind of one of those things. We are not trying to change your mind about something, but it's one of those things these lawyers are entitled to know and you are the only person that can tell us on that. I can't guess what is in your mind. It's kind of like if your kid came in and he has got cookie crumbs all over his face and you

heard a crash and you found a cookie jar on the floor. You pretty well know he ate the cookies. That's circumstantial evidence. No one saw him get into that jar. The juror said: I understand that and that I would understand. I don't know. On the same page, 1007, line 21, she replies again: I don't know. I could, but I guess it would be kind of -- I don't know. It would be hard for me -- I don't know kind of got me on that one. And we are still talking about circumstantial. The question in response to that was whether or not she would require the State to come forth with an eye witness, and at that time I really became -- you know you start trying to decide well, should you take a chance, because she had responded properly to everything else, and I still at that time maybe still wanted her. I did not move to strike her for cause and I guess I just had not made up my mind at that time, and on page 1009, line 18, I say: my question to you, can you use or apply circumstantial evidence or the fact that you don't have an eye witness or you don't have any direct testimony, can you apply that and arrive at whether or not a person is guilty or not guilty? Can you sit in judgment of another human being by applying and finding him guilty if it is proven to you beyond a reasonable doubt? Can you apply that law, and her answer was: I don't think so, and really from those responses -- and I don't think I ever moved to strike her for cause. I struck her as a peremptory. I may have begun, but I don't think I did. The way I questioned her after that as far as would

it be an inconvenience as far as coming here and missing work and things of that nature, I may have still was toying in my mind whether or not to take her, and at the conclusion I felt it was just too big of a risk. My strikes were in a good position and I was in good shape and that time was not the time to take any risks, so I struck her.

Q The main reason you struck her then was she could not follow the law on circumstantial evidence?

A She had problems in that regard, yeah.

Q Did you strike her because she was a black person?

A No.

Q Would you have stricken her even if she was a white person?

A Yes, sir.

(B.H. 104-10).

Relevant Portions of Voir Dire of Frank E. Samuel

Q Good morning. As the Judge said, we have several questions to ask you. A lot of it is concerning certain applications of our laws; whether or not you can apply a law in a certain fact situation; whether or not you believe in that law; and, again, whether or not you sit on a jury and apply

the law to the facts that you hear from the witness stand.

One of the laws that we will be going over is the law of causatation. The law of causation is a law that I anticipate the Judge--

MR. DOWELL: We object to voir dire on 6.04.

Q (By Mr. Royce) --might give to you. In explaining the law of causation, let me first go through the piece of paper that charges Mr. Tompkins, this man right here, with the offense of capital murder.

It alleges certain elements, certain things, that we must prove to you beyond a reasonable doubt. One of the things we must prove to you is the date that it happened; that on or about January 26, 1981, Mr. Tompkins committed capital murder. I must prove to you also where it happened, what jurisdiction; and I must prove just that it happened in Harris County, Texas. So the date, the Harris County, Texas--and then I must prove to you that the murder happened while in the course of committing or attempting to commit robbery. And I must prove to you, further, that during the course of that robbery, Mr. Tompkins had the intent to cause the death of Mary Berry, and I must prove to you what it means. Mary Berry died by suffocation, placing a cloth gag in her mouth. So I must prove to you the date, January 26, 1981; I must prove to

you that the crime happened in Harris County, Texas; and I must prove to you that Mr. Tompkins, while in the course of committing the offense of robbery, intentionally caused the death of Mary Berry; and I must prove to you by what means.

Intent-- if you notice, this piece of paper used the word "intent." Intent--I obviously can't open a man's mind up and say: Here it is. I can prove intent by either acts done or words spoken, by the witnesses that testify. Let's say that someone comes up to you and points a gun at you and says, "Give me your money" and shoots you and kills you and someone witnessed that particular transaction. Someone saw that. Well, one, if those facts were testified to in court, one could come to the conclusion that person had the intent to rob you and also had the intent to kill you by what those people observed. The guy came up to you and he said a certain thing and he said, "Give me your money" and he had a gun and pointed that gun at you and pulled trigger. With those facts, one could come to the conclusion that the person had the intent to commit capital murder -- or had the intent to commit murder. Now, sometimes the law furnishes intent for us. It does so by the law of causation. Now, the law of causation says if the person has the intent of committing one felony and during the course of that felony, another felony is committed, then we are going to hold him

responsible for that act, even though he never meant it.

Let me give you and example. A goes into a bank with the purpose of robbing that bank. He goes up to the teller and pulls a gun and says, "Give me your money." The security guard that works in that bank sees what's going on and he pulls-- that is, the security guard pulls -- his gun or fires at the robber but misses him and kills B, a person who was there to cash their check. Now, we know A can be charged with capital murder because he was in the course of committing robbery where someone got killed. Now, he didn't intend to kill that lady; in fact, he wasn't the one that shot her. But the law says that if one has intent to commit a felony, like he had the intent to commit that robbery--he went in there with that intent--and, during the course of that robbery, someone else got killed, even though he didn't mean to cause that injury, then the Court is going to hold him responsible; and he can be charged with capital murder, be found guilty of capital murder, and the death penalty could be assessed.

Now, the Judge said, if, for any reason, I don't explain myself to your satisfaction, please tell me.

Now, my question to you is: Can you apply the law of causation in a capital murder case, in a proper case?

A Can I apply? Can I apply?

Q Do you have any trouble with that law? The law of causation says that we are going to furnish the intent. We are going to hold you responsible for what you did but we are going to go a step further and hold you responsible for something you didn't do, because you start--it's like a snowball going down a mountain. That snowball accumulated more snow as it went down. And as a result of it--but for that person's action, that lady would not have been killed, you see.

A (Juror nods head.)

Q My question to you is: Can you find someone guilty of capital murder by applying the law of causation?

A I think so.

Q Now let's assume that we found someone guilty of capital murder. Capital murder is when someone, for our purposes,--while in the course of committing a robbery, he intentionally caused the death of somebody.

Let me give you another example. A guy goes into a U-Totem with the purpose of robbing the place. He does so and he takes the customers of that U-Totem and places them in a cooler and locks them up and ties them up and leaves them. Now let's say the air-conditioning cuts off for some reason and the people die. They

suffocate. Now, air can't come in. Now, he comes in and he says: Well, I intended to rob the place but I didn't intend to kill them; the cooler was cool, and they could have stayed in there for a week without any harm coming to them. People come in and out of that store. Someone would have found them. The law of causations says we are going to hold him responsible for those people's death, even though he didn't mean to kill them, and he can be charged with capital murder and be found guilty of capital murder and the death penalty assessed.

Now, let's assume we have found the person guilty of capital murder. We said you are guilty. What happens to him? Well, the Judge will submit two questions to you in deciding whether or not a person should be put to death. If you answer both questions yes--if all twelve jurors answer both questions yes--then the Judge will assess the death penalty. Those two questions are on the board. If you will, will you read Question No. 1 for us. It says "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased or another would result."

Q And Question No. 2?

A "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Q Question No. 1--you have found the person quilty of capital murder. All right. He has done it--what he is charged with. Through the law of causation--let's backtrack one second, if I may.

Another law that we have is the law of parties. The law of parties says if A and B go in the bank and they plan it--B's job is to take the money out--take the money out of the cash register. That's all; he doesn't have a gun. He doesn't mean to hurt anybody. A and B go into the bank. B goes up to the teller, takes the money, and leaves. A kills someone in the course of that robbery. Now, we know A can be charged with capital murder because he was in the course of committing that robbery and he caused someone's death. B. can also be charged with capital murder because the law of parties says if you help--if B helps in the commission of that robbery/murder, then we are going to find him just as guilty; you see? And he can be charged with capital murder.

Can you apply the law of parties? What I mean by "apply"--do you agree with the law of parties?

A I think I would.

Q We also have a law that a defendant has a right not to testify. He has a right not to put on any evidence whatsoever if he doesn't want to. Let's assume that I prove to you that that he is guilty and you find him guilty. Before you could find him

guilty, would you require him to take the stand and tell his side of the story?

A I think so.

Q Now, the law says that--

THE COURT: Let me interrupt, Mr. Royce.

Mr. Samuel, the law says that nobody has to testify in their own behalf, and they don't have to put any evidence on. The State has to prove them guilty. They don't ever have to take the stand unless they want to. And the jury can't require them to do so, just like the State can't make them take the stand. And the fact that somebody doesn't take the stand or doesn't put on any evidence--you can't use that as any evidence against him.

JUROR SAMUEL: (Juror nods heads.)

QUESTIONS BY MR. ROYCE:

Q Now, during your questioning there are no right or wrong answers. The whole purpose of my talking to you and these gentlemen talking to you is to determine how you feel concerning certain laws. Some of us just like capital murder--some of use can apply it, can give it, can assess--participate in assessing the death penalty on any case. They have no ill feelings about the death penalty. It's like you have stated. There are others that don't believe

in it, don't like it, and couldn't sit in judgment of another human being because of it. There are those that may believe in it but they don't want any part in it and they don't want to judge another person. That's why we are asking you, because we don't want you to go against a particular belief or conviction you might have. So after the explanation that the Judge gave to you, if I, say, prove to you that the person is guilty, would you require him--knowing the law says he doesn't have to take the stand; he doesn't have to put on any witnesses; but because of your conviction or your beliefs, would you require him to do so?

A No.

Q The law says I don't have to prove motive, the reason why someone went--let's say the reason was someone committed a crime. Let's take our bank robbery explanation. Why did he go in there? Just a mean old cuss or did he have a fight with his wife or did he need money for food or what prompted him to go in that bank? The law says I don't have to prove it to you. I don't have to prove why a person committed a crime. Would you require me to prove that to you?

A Would I require it?

Q Yes, sir, before you could find someone guilty.

A (Juror nods head.)

THE COURT: Now, Mr. Samuel, the law says he doesn't have to, because it pretty much is impossible to prove somebody did something. And the law says he doesn't have to prove why somebody did it; just that he did it.

Q (By Mr. Royce) Do you see? Would you make me prove the reason why before you could find someone guilty?

A Would I make--

Q Yes, sir.

A No.

(R. XVI 12-26).

Prosecutor's Reason for Peremptory Strike of Frank E. Samuel

Q Mr. Royce, directing your attention to Frank Samuel, would you please tell the Court the reasons for your striking Mr. Samuel?

A What I need is--well, first, we were provided with a short form data sheet and a long form data sheet. If you refer to the long form data sheet on Mr. Samuel--well, first, you have to read the short form. I don't have the short form.

THE COURT: I believe Mr. Dowell has it. Could I see it and we will mark it?

MR. DOWELL: It's in the record.

A Okay, if you look at the short form, to me, in my opinion, the short form is filled out-- it's mailed to the prospective jury person and it's filled out and it is sent back. Whoever filled this out was not Frank Samuel, and when I saw this and saw the long questionnaire form, I had a strong suspicion this man could not read and write and what keyed me was that someone else, in my opinion, definitely filled out the short form and he signed it, and in my estimation you can really tell the difference. Then when you look at the long form your age, for example, I didn't know whether he was forty-eight or forty-nine. I must admit sometimes I have problems when it comes to my age and I have to use my fingers, but he didn't know the month. It was either the tenth or twelfth month, and by the way he writes, to me indicated he had a hard time writing. If you go to if he was married, he answered that he lived in Harris County, Texas for thirty years. City and state of previous residence, he puts his address or some address, 4422 Montrose, so he doesn't really answer the question. Your occupation-- well, I an not sure, but I'm sure that's either filler of some part, but it's o-r-d-a- and f-i-l-l-e-r

MR. PEREZ: Judge, I don't know if this is necessary, but, for the record, can we have this marked as some kind of exhibit?

THE COURT: Yes, sir, you may, and the short form as well if you desire. You may have them marked.

(State's Exhibits 1 and 2 marked.)

MR. PEREZ: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q (By Mr. Perez) When you say the long form, are you referring to State's Exhibit 1?

A Yes, sir.

Q And the short form, you are referring to State's Exhibit 2?

A Yes, sir.

Q In fact, it's the upper third portion of State's Exhibit 2?

A That's right.

MR. PEREZ: Your Honor, the State is going to offer into evidence, for the purpose of this hearing, State's Exhibits 1 and 2

THE COURT: Any objection?

MR. DOWELL: No.

THE COURT: All right, State's Exhibits 1 and 2 are admitted. May I see at least State's Exhibit 1?

(State's Exhibits 1 and 2 admitted)

A Yes, ma'am, I have a copy of it. If you go to number 13, he seems like he had a problem spelling Houston. If you go to line 15, he says he was in the military service and when he spells' Army it's A-m-r-y. I am not the greatest speller in the world, but I can spell Army. If you go to 16 where it says religious preference, I assume he was going to put Baptist, but couldn't spell it and he just put B. From that and--it was my opinion that this particular case was a very complex case. It had complex issues, and the last thing I wanted to do was put someone on there that would have been uncomfortable or I felt could not at least read the jury charge and have at least the ability to understand it, and what was going on and especially the issues that were involved, after seeing this, I just felt that I didn't want this person on that jury and mainly I really questioned his comprehension and if you have a hard time reading or writing I am not too sure on a serious case like this that I would want that kind of person on there, and that was my thinking, rightfully or wrongly, and, in fact, when I asked him the question I really did think in all honesty that the man couldn't even read and I did ask him to read, I think, questions one and two, and to my surprise, he was able to read them, but even in that respect I was going to strike the man because of those

reasons. I just didn't feel he could comprehend the issues or that he could read the charge and I made my mind up from the very beginning--probably when I saw the questionnaire.

THE COURT: Let me interrupt you a second. On State's Exhibit 2 you have attached four pages of questionnaire. I presume you didn't intend to?

MR. PEREZ: No, Your Honor.

THE COURT: Only the first one applies to this venireman. I will remove it, gentlemen, with your consent, and give it back to you. It has nothing to do with this individual.

MR. DOWELL: Thank you.

MR PEREZ: Thank you, Your Honor.

THE COURT: Sure.

A And that was the reason.

Q (By Mr. Perez) Did you strike him, sir, because he was a black person?

A No.

Q Would you have done the same thing with a white person?

A Yes, sir.

(B.H. 134-39).

Supreme Court, U.S.
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No. 87-6405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILLIP D. TOMPKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
A. The *Beck* Issue	2
B. The *Batson* Issue	6
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page(s)
Batson v. *Kentucky*, 476 U.S. 79 (1986)	*passim*
Beck v. *Alabama*, 447 U.S. 625 (1980)	*passim*
Brooks v. *Tennessee*, 406 U.S. 605 (1972)	5
Castaneda v. *Partida*, 430 U.S. 482 (1977)	9
Davis v. *Wechsler*, 263 U.S. 22 (1923)	4
Downes v. *Scott*, 45 U.S. 500 (1846)	8
Enmund v. *Florida*, 458 U.S. 782 (1982)	8
Gardner v. *Florida*, 430 U.S. 349 (1977)	2
General Trading Co. v. *State Tax Commission (Iowa)*, 322 U.S. 335 (1944)	2, 7
Griffin v. *California*, 380 U.S. 609 (1965)	5
Harris v. *New York*, 401 U.S. 222 (1971)	5
Israel v. *Arthur*, 152 U.S. 355 (1894)	8
Jackson v. *Virginia*, 443 U.S. 307 (1979)	4
Jenkins v. *Anderson*, 447 U.S. 231 (1980)	5
Keeble v. *United States*, 412 U.S. 205 (1973)	6
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977)	5
Leland v. *Oregon*, 343 U.S. 790 (1952)	5
Mathews v. *United States*, ___ U.S. ___, 108 S. Ct. 883 (1988)	4
McGautha v. *California*, 402 U.S. 183 (1971), *vacated*, 408 U.S. 941 (1972)	5
Miedreich v. *Lauenstein*, 232 U.S. 236 (1914)	7
Milk Wagon Drivers Union v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941)	14
Montoya v. *State*, 744 S.W.2d 15 (Tex. Crim. App. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2887 (1988).	2
Mullaney v. *Wilbur*, 421 U.S. 684 (1975)	5
Rougeau v. *State*, 651 S.W.2d 739 (Tex. Crim. App. 1982)	9
Simmons v. *United States*, 390 U.S. 377 (1968)	5
Smith v. *Phillips*, 455 U.S. 209 (1982)	8, 14
Sumner v. *Mata*, 449 U.S. 539 (1981), 455 U.S. 591 (1982)	8
Texas v. *Mead*, 465 U.S. 1041 (1984) (mem.)	9
Thomas v. *Texas*, 212 U.S. 278 (1909)	8
Tison v. *Arizona*, 481 U.S. 137 (1987)	8
United States v. *Salvucci*, 448 U.S. 83 (1980)	5
Vasquez v. *Hillery*, 474 U.S. 254 (1986)	15
Wolfe v. *North Carolina*, 364 U.S. 177 (1960)	7, 14
Woodson v. *North Carolina*, 428 U.S. 280 (1976)	2

Introduction

The arguments on which the State of Texas rests are at war with this Court's precedents. First, the State asserts that this Court's decision in *Beck* v. *Alabama*, 447 U.S. 625 (1980), was satisfied here because petitioner's jury was charged regarding *a* non-capital offense. That assertion misses the point of *Beck*. *Beck* is premised on this Court's concern for rationality and reliability in jury verdicts where the defendant's life is at stake. The test for determining whether *Beck* is satisfied is not the number of instructions given, but whether those instructions respond to the elements in doubt in the State's capital case. Here the evidence left considerable doubt regarding petitioner's intent to kill the deceased, but the court's instructions denied those jurors who were unpersuaded of the petitioner's intent to kill the option of convicting petitioner of a non-intentional killing. The instructions thus denied those jurors the opportunity, required by *Beck*, to return a verdict in conformity with their view of the evidence.

Second, the State reads *Beck* as requiring a lesser included offense instruction in a capital case only if the evidence supporting such an instruction emanates from the defendant. *Beck* does not apply, the State asserts, if the lesser offense is supported by inferences drawn from the prosecution's case. There is no support for this position. In a capital case based solely on circumstantial evidence, the defendant, like the State, has the right to urge the jury to find whatever favorable inferences can be drawn from the evidence, without regard to who produced that evidence.

Next, in arguing that the court of appeals did not violate this Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the State seeks to amend, rather than to

defend, the decision of the court of appeals. It asks this Court to affirm the decision below on the basis of factual findings made by the trial court, but specifically rejected by the court of appeals. The State's position conflicts with nearly two centuries of this Court's precedent. The facts on which the Texas Court of Criminal Appeals "founded its judgment are . . . controlling here." *General Trading Co.* v. *State Tax Commission (Iowa)*, 322 U.S. 335, 337 (1944).

We first briefly address the State's position on *Beck* and then its position on *Batson*.

A. The *Beck* Issue

1. The State argues that, since the jury was instructed on the lesser included offense of non-capital intentional murder, Mr. Tompkins was not also entitled to instructions on the lesser included offenses of involuntary manslaughter and criminally negligent homicide.[1] "If Tompkins had been charged with only murder rather than capital murder, he would have had no constitutional entitlement to the requested instructions, even had there been evidence to support them," and the fact that he was "charged with a capital offense should not lead to a different result . . . ." Resp. Br. at 13-14.[2] But of course it should; that is the whole point of *Beck*. 447 U.S. at 637. *See also Gardner* v. *Florida*, 430 U.S. 349, 357-8 (1977) (opinion of Stevens, J.); *Woodson* v. *North Carolina*, 428

[1] The State's suggestion that involuntary manslaughter and criminally negligent homicide are not lesser included offenses of capital murder, Resp. Br. at 13, is incorrect. *See, e.g., Montoya* v. *State*, 744 S.W.2d 15, 28 (Tex. Crim. App. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2887 (1988).

[2] Throughout, references to Respondent's Brief are "Resp. Br."

U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, J.J.).

Tompkins, like Beck, was convicted of a capital offense and sentenced to die. Like Beck, his death sentence rests upon a verdict returned by a jury that was not given the alternative of responding rationally to the evidence by convicting of lesser included offenses which the evidence supported. Perhaps some jurors might have found the elements of non-capital murder rather than capital murder on the record of petitioner's trial; other jurors might not. But a juror who could see no basis for a finding of non-capital murder might well have found the elements of involuntary manslaughter or criminally negligent homicide. To deny such a juror the option of returning a non-capital verdict in conformity with his or her view of the evidence flouts *Beck's* concern for rationality and reliability in judgments that spell life or death.

The State contends that the non-capital murder instruction gave petitioner's jury the "third option" that *Beck* requires in capital cases. Resp. Br. at 12. But that instruction gave the jury no third option on the critical and contested element of intent. Rather, the trial court's instructions required the jury either to find that petitioner intended to kill the deceased or to acquit him. The jury was given no option to convict petitioner based upon a less culpable mental state. Consequently, rather than providing a constitutionally sufficient third option, petitioner's jury instructions, like those in *Beck*, did not respond to the "doubt [raised by the evidence] with respect to an element of [the] capital offense," *i.e.*, petitioner's state of mind. 447 U.S. at 637.

2. The State argues that the question of the sufficiency of the evidence to activate a federal constitutional

rule for adjudicating state-law crimes is a "matter of state law" to which this Court must defer. Resp. Br. at 14-15. To the contrary, it is a matter of federal law for this Court's independent determination. *See Jackson* v. *Virginia*, 443 U.S. 307 (1979); *see also Davis* v. *Wechsler*, 263 U.S. 22, 25 (1923) (the federal courts are obliged "to see that local practice shall not be allowed to put unreasonable obstacles in the way [of the enforcement of federal rights].")

3. The State next contends that a capital defendant cannot urge the jury to return a conviction of a lesser offense upon the prosecution's evidence alone, but can invoke *Beck* "only where the defendant actually presents evidence which creates a factual conflict [with the prosecution's evidence]." Resp. Br. at 15. Otherwise, the State complains, lesser included offense instructions will have to be given in every capital case in which circumstantial evidence creates "the possibility of conflicting inferences from uncontradicted testimony," and "defendants [will be able] to assert inconsistent defenses to their benefit and the unfair detriment of the state." Resp. Br. at 17. But there is nothing wrong with either of these prospects. *See Mathews* v. *United States*, ___ U.S. ___, 108 S. Ct. 883 (1988). Defendants in capital prosecutions based on circumstantial evidence that permits "conflicting inferences" *should* be able to argue inconsistent factual theories and get instructions on all of those that the evidence supports. By definition, the truth of what actually happened in such cases is not known or knowable except by inference. So the defendant, like the State, must be allowed to urge the jury to find whatever favorable sets of facts the "conflicting inferences" will support, and the jury must be allowed to return the full range of verdicts legally implicated by those facts.

What the State in effect argues is that, in order to obtain a lesser included offense instruction in a capital

case, the defendant must submit evidence sufficient to permit a rational juror to convict him of the lesser offense. Resp. Br. at 19-20. Such a rule would contravene the defendant's Fifth Amendment right against self-incrimination and would create the "intolerable" situation in which "one constitutional right [would] have to be surrendered in order to assert another." *Simmons* v. *United States*, 390 U.S. 377, 394 (1968). *Accord United States* v. *Salvucci*, 448 U.S. 83, 89-90 (1980); *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806-07 (1977); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-13 (1972). The State's citation of *Leland* v. *Oregon*, 343 U.S. 790 (1952), for the proposition that the burden of proof may properly be allocated to a defendant (Resp. Br. at 20), confuses the defendant's burden on affirmative defenses, such as insanity, with the State's obligation to prove the defendant guilty of each element of a criminal offense.[3] The State's reliance on *Jenkins* v. *Anderson*, 447 U.S. 231 (1980); *Harris* v. *New York*, 401 U.S. 222 (1971); and *McGautha* v. *California*, 402 U.S. 183 (1971), *vacated* 408 U.S. 941 (1972) (Resp. Br. at 19), likewise, is inappropriate. While a defendant's exercise of his right to remain silent may not always be painless, the State cannot directly penalize a person's failure to waive his Fifth Amendment rights. *Griffin* v. *California*, 380 U.S. 609 (1965); *see also Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

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[3] "[I]n *Leland* . . . the issue of insanity as a defense to a criminal charge was considered by the jury only after it had found that all elements of the offense, including the *mens rea*, if any, required by state law, had been proved beyond a reasonable doubt . . . . [T]he existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Mullaney* v. *Wilbur*, 421 U.S. 684, 705-6 (1975) (Rehnquist, J., concurring) (citations omitted).

4. The State's final *Beck* argument wholly misses the point of *Beck* and of petitioner's brief. It treats petitioner as saying that "the jury was . . . 'required' to draw" the inferences supporting conviction of involuntary manslaughter or criminally negligent homicide. Resp. Br. at 18. The point made in the passage, which respondent quotes out of context, is that *if* the jury found petitioner killed the deceased but that such killing was not intentional (the *mens rea* of capital murder), it was required to draw one of two other mutually exclusive inferences—the only remaining legally relevant inferences under the Texas Court of Criminal Appeals' construction of the applicable Texas law and of this record. The first permissible inference was that petitioner was aware of the risk of death that his conduct created, although he did not intend to kill the decedent (the *mens rea* of involuntary manslaughter). The second permissible inference was that petitioner was not aware of the risk of death that his conduct produced (the *mens rea* of criminally negligent homicide). Precisely because a rational jury was *not* required to draw one rather than another of these inferences—or the inference of intentional killing—*Beck* requires that instructions be given on each of the offenses. *See Keeble* v. *United States*, 412 U.S. 205, 212-3 (1973). That obligation could not be cancelled, as the court of appeals sought to do, by reasoning that the record demonstrated advertence too clearly to allow instructions on negligent homicide and, at the same time, demonstrated inadvertence too clearly to require instructions on involuntary manslaughter.

B. The *Batson* Issue

1. The court of appeals approved the peremptory challenge of prospective juror Green on the ground that the prosecutor's explanation for the challenge, *i.e.*, Mr. Green's employment as a postal worker, was a "racially neutral explanation" and, therefore, satisfied the requirements of *Batson*. J.A. at 72. The State terms "the conclusion reached by the court of appeals . . . incomprehensible . . ." and refuses to defend it. Resp. Br. at 29. The State, instead, asks this Court to affirm the judgment of the court of appeals on the basis of the trial court's findings of fact, which were rejected by the court of appeals.

The State's entire argument rests upon the premise that "[b]ecause the Court of Criminal Appeals is not a fact-finding court and because the factual bases it found to be the reasons for the prosecutor's exercise of their [sic] peremptory strikes are at odds with the record and the findings of the trial court . . . the proper focus of this Court is on the findings of the trial court and not the erroneous and unsupported conjectures of the court of appeals." Resp. Br. at 22. This effort to nullify the factual findings of the Texas Court of Criminal Appeals offends every principle of federalism and appellate review.

For more than a century, this Court has accepted as binding, for purposes of its review of a state court judgment, the factual bases on which the judgment of the highest court of the state is founded. "The facts on which [the highest state court] founded its judgment are of course controlling [in this Court]" *General Trading Co.* v. *State Tax Commission (Iowa)*, 322 U.S. 335, 337 (1944). *See also Wolfe* v. *North Carolina*, 364 U.S. 177, 194-5 (1960) ("The judgment before us for review is the judgment which the Supreme Court of North Carolina made on the record before it, not the action of the state trial court."); *Miedreich* v. *Lauenstein*, 232 U.S. 236, 243 (1914) ("This Court has repeatedly held that in cases coming to it from the supreme court of a state, it accepts

as binding the findings upon issues of fact duly made in that court."). *See also Israel* v. *Arthur*, 152 U.S. 355, 362 (1894); *Downes* v. *Scott*, 45 U.S. (4 Howard) 500, 502 (1846).

Even in habeas corpus proceedings, the federal courts are required to defer to state appellate court findings of fact. *Sumner* v. *Mata*, 449 U.S. 539 (1981), and 455 U.S. 591 (1982) (*per curiam*). *A fortiori*, on direct review of a state court judgment, this Court does so. *See, e.g., Tison* v. *Arizona*, 481 U.S. 137 (1987). Where the highest court of a state has made findings contrary to those of a state trial court, it is the appellate court's findings, not the trial court's, that are controlling in this Court. *See, e.g., Enmund* v. *Florida*, 458 U.S. 782 (1982).

Smith v. *Phillips*, 455 U.S. 209 (1982), (Resp. Br. at 22 n.5), has nothing at all to do with this point. *Phillips* concerns a respondent's right to stand on legal grounds distinct from those on which it prevailed below. It does not license respondents, any more than petitioners, to stand on a version of the facts that the state's highest court explicitly found unsupportable upon the record.

The State's current attempt to resuscitate the trial court's findings stands in sharp contrast to its position in the virtually identical case of *Thomas* v. *Texas*, 212 U.S. 278 (1909). In *Thomas*, the petitioner was a black man convicted of capital murder. He argued, on appeal, that his conviction was secured in violation of the Fourteenth Amendment because the prosecutor excluded blacks from his grand and petit juries. The only difference between these two cases is that, in *Thomas*, the appeals court, "after a full review of the testimony," wholly affirmed the findings of the trial court. 212 U.S. at 280. In this Court, Texas argued that the question of prosecutorial motive

was "a pure question of fact; and this court will not revise the decision of the highest court of the State thereon." *Ibid.* This Court agreed, holding "that questions of fact will not be reviewed by this Court on writs of error to state courts." *Id.* at 281. Texas is apparently only content with this rule when the findings of its court of appeals support its cause.[4] When a court of appeals' opinion becomes inconvenient, Texas slaps on the label of "erroneous and unsupported conjectures," (Resp. Br. at 22), and seeks to suspend the general rule of deference.[5]

2. Even if the State were not bound by the findings on which the court of appeals founded its judgment, there is

---

[4] Respondent has no difficulty embracing the doctrine of deference when it believes its operation will fortify Texas' position. *See* Resp. Br. at 14-15.

[5] Texas seeks to bolster its position by arguing that the court of appeals is not properly a fact-finding court and, therefore, should have deferred to the trial court's findings. However, the level of review applied by the Texas Court of Criminal Appeals in this case was neither novel nor unique. The court of appeals has assumed the task of indepth review in other areas. *See, e.g., Rougeau* v. *State*, 651 S.W.2d 739 (Tex. Crim. App. 1982) (*en banc*), *cert denied*, ____ U.S. ____, 108 S. Ct. 1586 (1988) (the court of appeals reviewed the evidence and reversed the trial court's exclusion of a juror on *Witherspoon* grounds); *Castaneda* v. *Partida*, 430 U.S. 482, 489 (1977) (court of appeals reviewed the merits and affirmed trial court's finding of no *prima facie* case of discrimination in selection of grand jurors).

Furthermore, the question of how deferential a state appeals court should be to a state trial court is purely a question of state law. *See Texas* v. *Mead*, 465 U.S. 1041, 1044 n.2 (1984) (mem.) ("The Texas courts are of course free, as a matter of state law, to decide for themselves what deference shall be given by appellate courts to the findings of trial courts.") (Rehnquist, J., dissenting from denial of certiorari). As such, any claim that the court of appeals exceeded its authority, absent a violation of a distinct federal right, does not present a federal question open to review in this Court.

no basis for challenging those findings here. The State argues that the court of appeals erred in rejecting the trial court's finding that Mr. Green was challenged because he (i) "changed his opinion on the propriety of the death penalty," (ii) responded to questions during *voir dire* with "nonverbal [answers] or 'yeahs,'" (iii) "vacillated regarding his ability to follow the law of causation," and (iv) "indicated that he might require evidence of premeditation." Resp. Br. at 22. The State argues that these findings should not have been rejected because there was evidence in the record to support them. But that would not be the test even if the State were free to challenge the court of appeals' decision to reject these findings. In order to overturn the court of appeals decision, the State would have to show that there was no record support for that decision. Such a showing could not be made here.

Although the trial court found that Mr. Green was challenged because he had difficulty with certain legal concepts, after "reading . . . the entire jury selection process," the court of appeals disagreed. J.A. at 71. It found that "this prospective black venireperson's answers . . . did not indicate a bias or prejudice against any phase of the law pertinent to this case." *Id.* It further found that this juror's "answers to questions asked did not indicate an inability on his part, that was any greater or any less than the unchallenged venirepersons, to understand the law or to apply it impartially." *Id.* There was ample support in the record for these conclusions.

Mr. Green was questioned extensively to determine whether he harbored any bias or prejudice with respect to the law relevant to the case. On the propriety of the death penalty, Mr. Green was first questioned by the Court:

> THE COURT: Consequently, I must ask you, sir, whether or not you have any religious; moral; or

> conscientious scruples—or scruples of any sort, for that matter—against the infliction of death as punishment for crime in a particular case?
>
> JUROR GREEN: No.
>
> Q. Am I right in assuming that would have no bearing on your deliberations regarding the guilt or innocence of this defendant?
>
> JUROR GREEN: Yes, ma'am.

R. Vol XVI pp. 95-96. Mr. Green was then questioned by the prosecutor:

> Q. I believe that you indicated to [the Court] that you had no objection to [the death penalty]; is that correct?
>
> A. Yes ma'am.
>
> Q. Have you always felt that way?
>
> A. Well, I don't know. I guess so. But then, again, it's like you said. Sometimes I felt that way and sometimes I didn't.

R. Vol. XVI pp. 100-101. After Mr. Green testified that his wife did not favor the death penalty, the prosecutor asked:

> Q. But you don't feel that way?
>
> A. (Juror shakes head.)
>
> Q. Would it bother you . . . to be a juror that renders a . . . verdict that . . . would require the Judge . . . to assess the death penalty?
>
> A. I don't know . . . . I haven't been through that thing; so I can't say what I would feel afterwards.
>
> Q. Thinking about it ahead of time, now does it give you any problem?
>
> A. No. Not now.

R. Vol. XVI pp. 101-102.

Although the State includes a portion of this testimony in its supplemental appendix, the appendix does not include the last question and answer quoted above or the court's examination of Mr. Green on this issue.

Similarly, the portion of Mr. Green's examination on the law of causation which is quoted by the State, (Resp. Br. 24-25), omits the final question and answer of Mr. Green's examination on this subject, which was as follows:

> THE COURT: It is kind of complicated. But could you follow that if the Court told you that was what the law was?
>
> JUROR GREEN: I could follow it.
>
> THE COURT: Down the line you might want to take that into consideration when you are trying to deal with the fellow, but the law supplies that in getting from here to there. It says if you do something that is illegal to begin with, then you are responsible for whatever else happens as a result of what you did, the idea being that if that fellow hadn't gone in the first place, nothing would have happened.
>
> JUROR GREEN: I understand.
>
> THE COURT: Fine.

R. Vol. XVI pp. 109-110.

Finally, the portion of Mr. Green's examination on the law of premeditation, which is quoted by the State, is also incomplete. *See* Resp. Br. at 27. At the conclusion of the testimony quoted by the State, Mr. Green answered "I don't think so," when asked if he would want the State to show premeditation. The balance of the Green testimony was as follows:

THE COURT: What she is getting at, Mr. Green, is although it is completely normal to say "I don't think" or "I believe so," everybody says that. In courtrooms it makes lawyers nervous. And what she is trying to ask you to do is to give her a yes or no answer. That's all that she was trying to ask for there.

QUESTIONS BY MRS. DAVENPORT:

Q. So would that be a yes or no?

THE COURT: Run the question by him again.

A. I think I am nervous.

THE COURT: I imagine you are. If you weren't nervous, Mr. Green, you would be the first person that ever sat on that chair that wasn't nervous.

A. Would you repeat?

QUESTIONS BY MRS DAVENPORT:

Q. Would you require me to show you some premeditation on his part before you could find him guilty?

A. No.

Q. Thank you.

R. Vol XVI at pp. 116-117.

After reviewing this testimony, as well as the "entire jury selection process," the court of appeals concluded that Mr. Green's answers to these questions did not explain the prosecutor's decision to peremptorily challenge this juror. J.A. at 71. The fact that the State would reach a different conclusion based on its review of the evidence, (Resp. Br. at 45), does not justify a departure from the long established rule that, where the highest court of a state has made findings contrary to those of a state trial court, the findings on which the highest state

court grounded its judgment are controlling for purposes of this Court's review. *See Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 294 (1941); *Wolfe* v. *North Carolina*, 364 U.S. at 194-95.

In sum, the State seeks to amend—not defend—the judgment below. Rather than propound alternative legal arguments for its case, like the respondent in *Smith* v. *Phillips*, *supra.*, the State wants to eject from the case entirely those specific components of the court of appeals opinion with which it disagrees. There is no precedent for the proposition that a respondent may confine this Court's review to the skeletal remnants of a comfortably redacted court of appeals opinion.

3. The State misunderstands petitioner's argument with respect to the challenge of prospective juror Thomas. Petitioner does not argue, as the State asserts, that "the prosecutor's reason for the challenge [must be] articulated with such precision that it can be demonstrated upon retrospective review to fully correspond with the record." Resp. Br. at 31-32. Rather, petitioner argues that once the explanation provided by the prosecutor is rejected by the court of appeals, the challenge may not be affirmed on the basis of an explanation provided by the court but not offered by the prosecutor. Pet. Br. at 39-40. To do so would be to ignore the purpose of the *Batson* inquiry: *Batson* requires testing the *actual* reason offered by the prosecution to see if it is genuine or pretextual. If the reason offered is contradicted by the record, it cannot be accepted as genuine. *Id.*

The State again misses the point when it argues that the court of appeals properly refused to consider the juror comparison offered by petitioner. The State's assertion that "the court of appeals properly refused to consider

matters which were not presented to the trial court," (Resp. Br. at 39), misunderstands what is at issue. The "matters" to which the State refers are inconsistencies between the prosecutor's treatment of black and white venirepersons who shared common characteristics apart from race. Such comparisons are in no way "based on evidence which was not presented to [the trial] . . . court." Resp. Br. at 40. They are based solely upon the recorded *voir dire* proceedings. The State confuses "evidence . . . not presented" to the trial court with an analysis of the evidence from a broader perspective than was argued to the trial court. That confusion was dispelled by *Vasquez* v. *Hillery*, 474 U.S. 254 (1986).

Finally, the State argues that, had the court of appeals considered the juror comparison, it would have reached no different conclusion with respect to the Thomas challenge. Resp. Br. at 44. The State bases its argument on an assertion that, while other jurors "apparently had difficulty understanding some of the principles of law put to them, they also stated without reservation that they could, in fact, apply the law once it had been adequately explained." *Id.* Thomas, the State asserts, was different. "She was simply noncommittal as to whether she could apply the law as she understood it and find a person guilty of capital murder in the absence of direct evidence." *Id.* The record belies this assertion.

When the law of circumstantial evidence was explained to Ms. Thomas, she too "stated without reservation that [she] could . . . apply the law." *Id.*

> Q. . . . now one of the tools so to speak in doing that, the law of circumstantial evidence. And you are saying that you can apply that law to a given set of facts.
>
> A. Yes, I could.

R. Vol. XI at pp. 72-78. Consequently, had the Court considered the juror comparison, it would have seen that Ms. Thomas' ability to apply the law of circumstantial evidence was as unqualified as that of the white jurors who were not challenged.

CONCLUSION

For the foregoing reasons and for the reasons set forth in petitioner's opening brief, the judgment below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIP D. TOMPKINS,

Petitioner,

—v.—

STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE TEXAS CIVIL LIBERTIES UNION, AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	12
ARGUMENT	16
I. BATSON IMPOSES AN AFFIRMATIVE OBLIGATION UPON TRIAL COURTS TO ENSURE THAT PROSECUTORS DO NOT EXCLUDE BLACK JURORS FOR RACIAL REASONS, REQUIRING THOSE COURTS TO VIEW WITH SUSPICION AND CAREFULLY SCRUTINIZE PROSECUTORS' REASONS FOR EXCLUDING BLACK JURORS ONCE A PRIMA FACIE CASE OF DISCRIMINATION HAS BEEN MADE	17
II. HAD THE TRIAL COURT APPLIED THE NECESSARY DEGREE OF SCRUTINY TO THE PROSECUTION'S TESTIMONY IN THE BATSON HEARING, IT WOULD HAVE FOUND THAT THE PROSECUTION ENGAGED IN UNCONSTITUTIONAL DISCRIMINATION ON THE BASIS OF RACE	29
III. WHERE A PRIMA FACIE CASE OF DISCRIMINATION HAS BEEN MADE, AN APPELLATE COURT REVIEWING BATSON FACT-FINDINGS CANNOT DEFER TO THOSE FACT-FINDINGS UNLESS THEY HAVE BEEN MADE IN A PROCEEDING WHICH HAS CAREFULLY SCRUTINIZED THE PROSECUTOR'S REASONS FOR EXCLUDING BLACK JURORS ON THE BASIS OF THE ENTIRE RECORD	40
CONCLUSION	46

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Louisiana, 405 U.S. 625 (1972). 2, 23

Anderson v. Bessemer, 470 U.S. 564 (1985) 41

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 22

Avery v. Georgia, 345 U.S. 559 (1953) 42, 43

Batson v. Kentucky, 476 U.S. 79 (1986) . . . . . passim

Boykin v. Alabama, 395 U.S. 238 (1969) 20

Buckley v. Littell, 539 F.2d 882 (1976) 43

Carter v. Jury Commission, 396 U.S. 320 (1970) 2

Edwards v. Arizona, 451 U.S. 477 (1981) 9

Ex parte Milligan, 4 Wall 2, 18 L.Ed. 281 (1866). 21

Fiske v. Kansas, 274 U.S. 380 (1927) . 43

Floyd v. State, 511 So.2d 762 (Fla.App. 1987) 25

Gamble v. State, 357 S.E. 2d 792 (Ga. 1987). 21

McCleskey v. Kemp ___ U.S. ___, 95 L.Ed.2d 262 (1987) 1, 21

McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984) 1, 21

Mitchell v. Johnson, 250 F.Supp. 117 (N.D.Ala. 1966) 2

Norris v. Alabama, 294 U.S. 587 (1935) 42, 43, 44

Pate v. Robinson, 383 U.S. 375 (1966) 20

Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987). 25

State v. Gilmore, 511 A.2d 1150 (N.J. 1986) 25

Swain v. Alabama, 380 U.S. 202 (1965) 2, 4, 12

Time Inc. v. Pape, 401 U.S. 279 (1971) 43

Turner v. Fouche, 396 U.S. 346 (1972) 2, 22

United States v. United States Gypsum Co., 333 U.S. 364 (1948) . . 41

United States ex rel. Yates v. Hardiman, 656 F.Supp. 1006 (N.D.Ill. 1987) . 25

INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members dedicated to the defense of individual rights, including the principle of racial equality embodied in the Constitution. The ACLU of Texas is one of its state affiliates. Of particular note here, the ACLU represented petitioner in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 106 S.Ct. 3289 (1986), the first federal court decision holding that a prosecutor's racially discriminatory exercise of peremptory challenges violates the Constitution.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit

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1/ Letters of consent have been filed with the Clerk of the Court, pursuant to Rule 36.2 of the Rules of this Court.

corporation established in 1939 to assist blacks to secure their constitutional rights. The Fund has a long-standing concern with the exclusion of blacks from service on juries. Thus, it has raised jury discrimination claims on appeal from criminal convictions,[2] pioneered in the affirmative use of civil actions to end discriminatory jury practices,[3] and represented the petitioner in Swain v. Alabama, 380 U.S. 202 (1965), the case which first raised the issue of the use of peremptory challenges to exclude blacks from jury venires.

Both the ACLU and NAACP Legal Defense Fund participated as amicus in Batson v. Kentucky, 476 U.S. 79 (1986),

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2/ E.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

3/ Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1972); Mitchell v. Johnson, 250 F.Supp. 117 (N.D.Ala. 1966).

and both organizations are deeply concerned about the proper implementation of Batson in trial courts throughout the country. In particular, amici believe that the decision below jeopardizes the principle of equal justice that the decision in Batson was meant to protect.

Accordingly, we submit this brief in support of petitioner but limit our attention to the Batson question presented for review.

STATEMENT OF THE CASE

Petitioner Tompkins is a black man who was tried and sentenced to death by an all-white jury prior to Batson v. Kentucky, 476 U.S. 79 (1986).[4] At Tompkins' trial, the venire contained 13 black prospective jurors. Eight of the

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4/ Amici adopt petitioner's statement of facts, but highlight those points of greatest relevance to the discussion below.

thirteen were successfully challenged for cause. The remaining five black jurors were barred from jury service by the prosecutor's use of peremptory challenges.

After jury selection was completed and before the presentation of any evidence, petitioner moved to quash the jury. Relying on Swain v. Alabama, 380 U.S. 202 (1965), the trial judge denied petitioner's motion without any inquiry into the prosecutor's actions. Thus, there is no contemporaneous explanation of the prosecutor's reasons for his peremptory challenges.

Batson was decided while petitioner's appeal was pending in the Texas Court of Criminal Appeals. The case was then remanded to the trial court, which conducted a Batson hearing six years after the original voir dire.

Upon finding that petitioner had established a prima facie case of discrimination under Batson,[5/] the trial judge asked the prosecutor to state the reasons for his peremptory challenges. The trial judge did not, however, compare the proffered reasons with the record of the original voir dire. Thus, she failed to consider the disparate treatment of white and black members of the venire.

Moreover, the trial court failed to consider evidence documenting a systemic pattern of discrimination against black jurors in Harris County. For example, the record revealed that black jurors

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5/ The court below affirmed this finding and respondent does not dispute it here. Slip Op. at 6. (References to the opinion of the Texas Court of Criminal Appeals,, which was unreported, will be to "Slip Op.," followed by the page number of the manuscript slip opinion. As of the date of filing, amici could not provide joint appendix cites to the Court of Criminal Appeals' opinion, because the joint appendix had not yet been printed).

were routinely excluded by at least one former Harris County Assistant District Attorney in every capital case involving a black defendant. Batson Hearing Transcript at 9. A chief prosecuting attorney with the Harris County District Attorney's Office testified during petitioner's Batson hearing that he had advised junior prosecutors to "beware of selecting minorities [as jurors] ... because they are not likely to feel as ingratiated towards you as a prosecutor ... [and] because essentially so many ... of the people we prosecuted ... [were] members of the black community." Id. at 19.

The chief prosecuting attorney also testified:

> [W]hen I was ... growing up in the D.A.'s Office ... I was told ... and it was historically true that everybody knew that the police had a terrible experience with minority communities, both black and Mexicans [sic]. In trying to serve an individual family or victim, you wanted to ... be careful that you did not make mistakes and have a juror that would hurt you ... and you would have to, because of the [voir dire] time limit, make generalizations about people and the fact that someone was a member of a minority group was a general characterization that I would make about ... prospective veniremen.

Id. at 29-30.

Consistent with this testimony, the principal prosecutor in petitioner's case admitted that "everybody" in the district attorney's office "talk[ed] about" race as a factor in juror selection during his tenure, that the juror's race vis-a-vis the defendant's race is "something you have to look at" during jury selection. Id. at 162-63.

Despite this evidence, the trial judge accepted at face value the prosecutor's reasons for excluding every potential black juror from petitioner's trial and concluded that those reasons

were constitutionally sufficient. Specifically, the trial court found that the prosecutor's racial pattern of peremptory challenges was justified by the following explanations: 1) two potential jurors expressed reservations about the death penalty; 2) juror Thomas had difficulty with the law of circumstantial evidence; 3) juror Samuel "had extreme difficulty with legal concepts"; and "though not illiterate, could not satisfactorily fill out juror information sheets and questionnaires"; and 4) juror Green had difficulty with the law of causation and expressed uncertainty regarding the death penalty.6/

The Texas Court of Criminal Appeals

6/ In his petition for writ of certiorari, Tompkins directs the Court's attention to the last three of the five black members of the venire removed through peremptory challenges. Accordingly, amici shall focus primarily upon the prosecution's rebuttal with regard to these three jurors.

expressed serious reservations about several of these post hoc explanations. With regard to Ms. Thomas, who expressed reservations about convicting someone of a capital crime based solely on circumstantial evidence, the prosecutor justified his exclusion by asserting that his case depended solely on circumstantial evidence and thus Thomas' views endangered his case. **Slip Op. at** 10. However, as the Court of Criminal Appeals correctly noted, at the time of voir dire the trial court had ruled petitioner's signed confession admissible. Id. It was only after voir dire that the confession was ruled inadmissible because of the intervening decision in Edwards v. Arizona, 451 U.S. 477 (1981). Thus, even though the state's case eventually became wholly circumstantial, at the time the

prosecution struck Ms. Thomas, its case was based upon the direct evidence of guilt provided by petitioner's confession.

The Court of Criminal Appeals also expressed substantial concerns about the exclusion of Mr. Green. According to the trial judge, Green was challenged because of difficulty with the concept of causation and qualms about the death penalty. But, as the Court of Criminal Appeals pointed out in its opinion, the only explanation offered by the prosecution for its exclusion of Green was that Green "had been an employee of the United States Postal Service for some thirteen years." Id.

In response to this explanation, the Texas Court of Criminal Appeals stated:

> We have some difficulty understanding the relevancy of a venireperson's employment as a postman employed by the United States Government as far as his qualifications for jury service. Although the prosecuting attorney indicated that "I have not had very good luck with postal employees," she did not elaborate upon her evident bias against such employees. Perhaps, indeed, federal postal employees share a common view of the criminal justice system antithetical to the interests of law enforcement. But if so, we are not aware of it, nor has the State undertaken to enlighten us further on the subject.

Id. at 11C.

Despite finding several of the prosecutor's explanations to be incredible based on other available evidence, the court below upheld petitioner's conviction out of deference to the "findings" of the trial judge who conducted the Batson hearing. In addition, the court below specifically declined to consider whether whites and blacks were subject to disparate treatment by the prosecution during the voir dire. The court reasoned that "[b]ecause the trial judge was not urged

to make, and did not make, a finding based upon a comparison analysis ... we do not consider this circumstance in reviewing the trial judge's findings in this cause." Id. at 9 n.6A.

SUMMARY OF ARGUMENT

For more than a century, this Court has consistently condemned racial discrimination in the selection of juries. But, as the Court recognized only two terms ago in Batson v. Kentucky, 476 U.S. 79, 92 (1986), the ideal of equality embodied in the Fourteenth Amendment can often be defeated by "crippling burden[s] of proof." Thus, in Batson, the Court overruled its earlier holding in Swain v. Alabama, 380 U.S. 202 (1965), that required proof of a widespread pattern or practice in order to establish racial discrimination in the use of peremptory challenges. Instead,

the Court held that a prosecutor's discriminatory exercise of peremptory challenges in even a single case violates the Equal Protection Clause.

Batson thus represented a "historic step" toward the final elimination of racial discrimination in jury selection. 476 U.S. at 102 (Marshall, J., concurring). At the same time, it represented only a "step." What was gained in Batson will quickly be lost unless the state's obligation to produce a nonracial explanation for its peremptory challenges is taken seriously once a prima facie case of discrimination is established.

This does not mean that a prosecutor's explanation must rise to the level of cause or that lengthy Batson hearings will now be required. It does mean that a prosecutor's explanation

cannot be accepted at face value if there is other evidence in the record suggesting that the explanation is pretextual. Obviously, that judgment must be made in the first instance by the trial judge. In making its judgment, however, it is incumbent on the trial court to view the record as a whole rather than focus on the prosecutor's explanation in isolation.

The tools for detecting pretext in a discrimination case are neither novel nor difficult to utilize. At a minimum, the trial court should consider whether black jurors are being excluded for reasons that are equally applicable to white jurors who are permitted to serve, whether the reasons offered for the prosecutor's challenge are case-related, whether the reasons offered are clear and reasonably specific, and whether the

prosecutor has a longstanding pattern or practice of excluding black prospective jurors for racial reasons or other history of racial discrimination. Taken together these principles call for a determination of the credibility of the prosecutor's explanation on the basis of the entire record.

In this case, the trial court's truncated inquiry began and ended with the determination that the state's explanations for its peremptory challenges were facially neutral. The trial court never considered whether other evidence in the record cast doubt on the validity of the prosecutor's post hoc rationalization. The trial court's error was then compounded by the Texas appellate court, which deferred to the trial court's "fact-findings" without recognizing its constitutional duty to

ensure that the trial court's fact-finding process had given careful scrutiny to the prosecutor's reasons for excluding black prospective jurors.

As Justice Marshall aptly observed in his concurring opinion, the decision in Batson will amount to very little if "easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his [peremptory] strikes on nonracial grounds." 476 U.S. at 106. This case offers the Court an important opportunity to prove that the promise of Batson has actual meaning in the real world.

ARGUMENT

Introduction

There is no dispute, nor could there be, that petitioner established a prima facie case of racial discrimination in

the prosecutor's use of peremptory challenges. Once such a case was established, "the burden shift[ed] to the State to come forward with a neutral explanation for challenging black jurors." Batson v. Kentucky, 476 U.S. at 97. The dispute presented by petitioner's case centers upon the degree to which the trial courts must scrutinize the state's "neutral explanation for challenging black jurors." Plainly, Batson "requires trial courts to be sensitive to the racially discriminatory use of peremptory challenges...." Id. at 99. The question to be resolved is the scope of the trial court's duty "to be sensitive."

I.

BATSON IMPOSES AN AFFIRMATIVE OBLIGATION UPON TRIAL COURTS TO ENSURE THAT PROSECUTORS DO NOT EXCLUDE BLACK JURORS FOR RACIAL REASONS, REQUIRING THOSE COURTS TO VIEW WITH SUSPICION AND

CAREFULLY SCRUTINIZE PROSECUTORS' REASONS FOR EXCLUDING BLACK JURORS ONCE A PRIMA FACIE CASE OF DISCRIMINATION HAS BEEN MADE

This Court's decision in Batson "adopt[ed a standard] under the Federal Constitution ... designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race." Batson, 476 U.S. at 89 n.22. Such a rule was required because "the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread." 476 U.S. at 101 (White, J. concurring). The evil meant to be eradicated by this Court's ruling, "[t]he [e]xclusion of black citizens from service as jurors[,] constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." 476 U.S. at 85. That evil is one

not only of injustice to the defendant on trial, but to the excluded juror and, indeed, the entire community as well. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." 476 U.S. at 81.

Although the Court in Batson did not set forth any specific procedures that must be followed to implement the rule established, it did make clear that its decision imposed on trial judges the duty to "supervis[e] voir dire in light of [the Court's] decision," 476 U.S. at 89, n.22, and to "conscientiously [perform] their respective duties under the Constitution," id. at 89. "By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, [the Court's] ... decision

enforces the mandate of equal protection and furthers the ends of justice." Ibid.

The duty imposed on trial judges in this context is no greater than that imposed in other contexts in criminal cases where federal constitutional rights involving the very integrity of the judicial process are concerned. See, e.g., Boykin v. Alabama, 395 U.S. 238 (1969) (trial judge must conduct a thorough inquiry into defendant's understanding of guilty plea); Pate v. Robinson, 383 U.S. 375 (1966) (trial judge must sua sponte conduct inquiry into defendant's competency if evidence before him suggests defendant may be incompetent).7/ It cannot be questioned

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7/ As one federal court has noted, "[t]he process of identifying discriminatory conduct and pretextual explanations is performed daily in the course of litigation under ... a host of ... statutes. It should not be considered unduly burdensome ... when a defendant's life is at (continued...)

that what is at stake in the selection of a petit jury in a capital trial is as fundamental to the integrity of that trial as the defendant's competence or the voluntariness of a plea. Indeed, the rule in Batson was the result of this Court's acknowledgment that there was a real and present "risk that the factor of race may enter the criminal justice process" through the prosecutor's use of peremptories in selecting the jury, and the Court's "recognition that 'the inestimable privilege of trial by jury ... is a vital principle, underlying the whole administration of criminal justice.' Ex parte Milligan, 4 Wall 2, 18 L.Ed. 281 (1866)." McCleskey v. Kemp __ U.S. _____, 95 L.Ed.2d 262, 290

7/ (...continued)
stake." McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984), vacated and remanded, 106 S.Ct. 3289 (1986).

(1987).[8]

The trial court cannot fulfill its important responsibility to safeguard the integrity of the process if it does not "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent [to discriminate] as may be available.'" Batson, 476 U.S. at 93 (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977)). In particular, once a prima facie case of discrimination has been presented, "the trial court must undertake a 'factual

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8/ This concern has special force in a death penalty case, for as the Court explained in Turner v. Murray, 476 U.S. 28, 35 (1986), "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.... The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."

inquiry' that 'takes into account all possible explanatory factors' in the particular case. Alexander v. Louisiana, supra, at 630." 476 U.S. at 95 (emphasis supplied).

At issue here is the extent of the inquiry to be undertaken by the trial court once a prima facie case of discrimination has been proved. Such proof raises a mandatory inference of purposeful discrimination, which must be rebutted by the state. Batson, 476 U.S. at 95. When the trial court conducts its inquiry, therefore, it must be from the perspective of suspicion of the prosecutor's actions, for the presumption that the prosecutor has performed in conformity with constitutional requirements has been destroyed by the defendant's prima facie case of discrimination. In addition, direct

evidence of historical discrimination by the prosecutor's office, such as that presented by Mr. Tompkins, should prompt the trial court to seriously question the prosecutor's actions. From such a perspective, it is wholly inappropriate merely to accept a prosecutor's facially racially neutral explanations for his striking of black members of the venire without further probing.

It would seem self-evident that any meaningful inquiry into the prosecutor's use of peremptory strikes of black prospective jurors would involve a review of the voir dire as a whole to determine whether the prosecutor treated blacks differently than whites and whether his asserted reasons for striking blacks applied equally to whites who were not

struck.[9] In a case such as Mr. Tompkins', where a transcript of the voir dire was readily available for the trial

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[9] Indeed, many lower courts have done precisely that. See Floyd v. State, 511 So.2d 762, 764-65 (Fla.App. 1987)(disparate treatment of white and black jurors provides "strong evidence" that prosecutor's explanation "is a subterfuge to avoid admitting use of the peremptory challenges"); State v. Gilmore, 511 A.2d 1150, 1168 (N.J. 1986)(holding that "[t]he only real difference between the . . . [challenged] black . . . and [unchallenged] white [prospective jurors] was their race," where prosecutor "fail[ed] to exercise peremptory challenges to remove white prospective jurors who possessed the same characteristics as black prospective jurors who were stricken); United States ex rel. Yates v. Hardiman, 656 F.Supp. 1006, 1009-10 (N.D.Ill. 1987)(ordering new trial where record revealed, inter alia, that "[t]he characteristics of the Negroes excluded were similar to those of non-Negroes who sat on the jury" and that "[t]he only characteristic . . . [the excluded black venire members] had in common was their race"); Roman v. Abrams, 822 F.2d 214, 228 (2d Cir. 1987)(rejecting as pretextual "an explanation [offered] for some of the challenges to White prospective jurors . . . [and not similarly used to challenge] non-white prospective jurors"); Gamble v. State, 357 S.E.2d 792, 796 (Ga. 1987)(noting "suspect[ness]" of prosecutor's proffered explanations where "similarly situated white jurors were not challenged, and citing this fact in support of holding that "the trial court's finding that the prosecutor successfully rebutted the prima facie Batson case is clearly erroneous").

court's review, it is inexcusable that such a review was not undertaken given the importance of the task assigned to the trial court.[10] A review based solely on demeanor cannot be countenanced when the prosecutor's explanations can be tested easily and objectively by reference to his actions.[11]

A reading of this Court's opinion in Batson suggests the kind of inquiry the trial court ought to conduct of the prosecutor's proffered explanations for

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10/ The trial court's obligation to review the voir dire is independent of any obligation defense counsel may have to bring it to the court's attention. The contrary conclusion by the Texas Court of Criminal Appeals, see p.12, supra, is further evidence that the Texas courts misunderstood their obligations under Batson once a prima facie case of discrimination has been established.

11/ In the usual post-Batson case, where the prosecutor will be required to justify his exclusion in the midst of voir dire, the comparison to the prosecutor's actions with respect to white jurors is just as important and can be readily accomplished.

his strikes of black members of the venire. First, the trial court should demand an explanation that is clear and reasonably specific. Without such an explanation, no evaluation of the prosecutor's true motives may be made. Second, the trial court should determine whether the explanation is one which links the asserted deficiency of the black prospective juror to some aspect of the prosecutor's case. An objection based on other grounds is unacceptable under Batson, 476 U.S. at 98 ("[t]he prosecutor ... must articulate a neutral explanation related to the particular case to be tried") (emphasis supplied). Finally, the trial court should determine if the explanation is credible. The credibility determination should be based not solely on the prosecutor's demeanor, but also on an assessment of the

plausibility of the explanation when viewed in the context of the voir dire as a whole, i.e., whether the explanation for striking the black member of the venire would apply equally to a white member of the venire the prosecutor accepted.

As the Court noted in Batson, "[i]n those States applying a version of the standard ... [enunciated in Batson,] courts have not experienced serious administrative burdens, and the peremptory challenge system has survived." 476 U.S. at 99 (footnote omitted). The kind of inquiry suggested by amici would not require more than the practice in those states. Yet without such an inquiry, the promise of Batson will be vain and illusory.

II.

HAD THE TRIAL COURT APPLIED THE NECESSARY DEGREE OF SCRUTINY TO THE PROSECUTION'S TESTIMONY IN THE BATSON HEARING, IT WOULD HAVE FOUND THAT THE PROSECUTION ENGAGED IN UNCONSTITUTIONAL DISCRIMINATION ON THE BASIS OF RACE

The transcript of the Batson hearing discloses that the trial judge did not engage in a searching examination of the prosecution's explanations. Rather, she accepted the prosecution's explanations at face value and found that they presented racially neutral reasons for the exclusion of jurors Thomas, Samuel and Green. If the trial judge had instead given the careful scrutiny to the prosecution's assertions that the Constitution requires, she would have determined that the explanations were not racially neutral, but instead were mere pretexts for the exclusion of these jurors on account of their race.

In arriving at its decision, the trial court failed to consider petitioner's substantial evidence regarding the Harris County District Attorney's longstanding practice of excluding prospective black jurors through the use of peremptory challenges. The motivation underlying this practice was explained by a chief prosecuting attorney: attorneys in his office were taught to "beware of selecting minorities [as jurors] ... because they are not likely to feel as ingratiated towards you as a prosecutor ... [and] because essentially, so many ... of the people we prosecuted ... [were] members of the black community." Batson Hearing Transcript at 19.

This explanation, which informed the decisions to exclude black jurors in Mr. Tompkins' trial, is an explanation which

the Court expressly rejected in Batson as racially neutral:

> [T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption -- or his intuitive judgment -- that they would be partial to the defendant because of their shared race.... The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.

476 U.S. at 97 - 98.

Had the trial court considered such evidence, it would have cast such serious doubt on the plausibility of the prosecution's explanations that the trial court would have been compelled to engage in more searching scrutiny of the prosecution's explanations. Further scrutiny would have produced unequivocal

evidence that the specific reasons given for the exclusion of jurors Thomas, Samuel and Green were merely pretexts for racially-motivated exclusions.

The trial judge initially failed to consider this unequivocal evidence by failing to compare the reasons offered for excluding jurors Thomas, Samuel and Green with the voir dire of white jurors. If the judge had undertaken this comparison, she would have found that the very reasons offered as justifications for the exclusion of the black jurors did not lead the prosecutor to exclude white jurors. Such disparate treatment is classic evidence of pretextual explanations for racially motivated decision-making.

As described in the Statement of the Case, the trial judge found that prospective jurors Thomas, Samuel, and

Green were properly excluded, inter alia, because they had difficulty with legal concepts such as circumstantial evidence and causation, and because their non-verbal responses to voir dire questions were "inarticulate." However, as petitioner demonstrated in his Supplemental Brief presented to the Court of Criminal Appeals, white jurors "selected for the trial also had problems with the issue of circumstantial evidence, causation and other areas of the law," Supp. Brief at 5, and also responded non-verbally to questions. Id. at 6. Indeed, the Court of Criminal Appeals noted that since most jurors suffered the same disabilities, such a comparison refuted the prosecutor's professed explanations at the Batson hearing.12/

12/ "[I]t is not uncommon for . . . venirepersons to appear inarticulate, confused, and tentative (continued...)

Further, the trial judge failed in her obligation to determine whether the prosecutor had given "clear and reasonably specific" explanations for the purportedly non-racial reasons for excluding the black jurors. Batson, 476 U.S. at 98 n.20. The reasons for excluding juror Green, in particular, would not have survived scrutiny under this principle. When asked during direct examination to explain why she exercised a peremptory challenge against Mr. Green, a member of the prosecution team said she "could tell from questions [she] asked and answers that [she] got why [she] would not want him on the jury." Her subsequent testimony provided little illumination as to the specific responses

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12/ (...continued)
[about] legal definitions and concepts, which are usually alien to most venirepersons." Slip Op. at 11B.

Mr. Green gave to cause such consternation.13/

The only specific reason given by the prosecuting attorney for excluding Mr. Green was that his employment disturbed her:

> I noticed that he had two years of college but had worked for thirteen and a half years ... for the U.S. Postal Service which, if nothing else, in his favor or against him, is kind of an alert to me, because I have not had very good luck with postal employees.... I noticed his wife also worked for the Post Office and I ... circled that on the juror card.

Batson Hearing Transcript at 208 (emphasis supplied).

13/ Batson Hearing Transcript at 208. The transcript reveals only that the prosecutor felt that Mr. Green had "flip flopped" during voir dire and that she believed that "he was not a very articulate person" because he responded to some of her questions with "either shakes, nods, yeah, I guess or uh-huh." See generally, id. at 209-14. As we have already noted, white jurors who responded in a similar fashion were not excluded for this reason.

However, during cross-examination, the prosecutor admitted that she "sometimes" had good luck with postal workers. Id. at 214. When she realized that this testimony might undermine her initial statement that her superstition about postal workers partially accounted for her challenge to juror Green, the prosecutor embellished her explanation with a belated suggestion that the Mr. Green's lack of ambition was the actual source of her concern.[14/] Such internal inconsistency made it impossible to conclude that the proffered explanation was either "clear" or "reasonably specific."

The trial judge further failed to assess whether the reasons given for the

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14/ The prosecutor said she was "curious as to why someone with two years college education would be a messenger for ten years." Id. at 216.

exclusion of some jurors were related in any way to the case being tried. With respect to juror Green, the prosecutor never attempted to explain how her generalized fears about postal employees, or her ostensible concern about Mr. Green's progress in employment were related in any way to petitioner's case. There is similar silence in the record about the relevance of Mr. Green's wife's employment. As the Court of Criminal Appeals observed, "[if] federal postal employees share a common view of the criminal justice system antithetical to the interests of law enforcement[,] ... we are not aware of it, nor has the State undertaken to enlighten us further on the subject." Slip Op. at 11C. Although the explanation that the challenged venireman was a postal worker is a "neutral" one, it nevertheless violates the Batson re-

quirement that the "neutral explanation" offered by the prosecutor be "related to the particular case to be tried." 476 U.S. at 98 n.11.

Similarly, the prosecutor failed to explain how the exclusion of juror Thomas -- due to her reservations about the use of circumstantial evidence -- legitimately informed the decision to excuse her at the time that decision was made. Even though the state's case later came to be based on circumstantial evidence (because of the subsequent decision to suppress petitioner's confession after Edwards was decided, Slip Op. at 10), at the time juror Thomas was excluded, the state's case was based on direct evidence (i.e., the confession). At that time, therefore, the purported reason for excluding her was wholly unrelated to the particular case to be tried.

Finally, the trial court's assessment of the prosecutors' credibility -- admittedly an important element of any Batson inquiry -- appears in this case to have been entirely divorced from any examination of the record as a whole. Had the record been examined in light of the principles designed to distinguish between pretext and legitimate, non-racial explanation, the trial court could have reasonably reached only one conclusion: that the prosecution's purportedly non-racial explanations were incredible and were merely pretexts for discrimination.

III.

WHERE A PRIMA FACIE CASE OF DISCRIMINATION HAS BEEN MADE, AN APPELLATE COURT REVIEWING BATSON FACT-FINDINGS CANNOT DEFER TO THOSE FACT-FINDINGS UNLESS THEY HAVE BEEN MADE IN A PROCEEDING WHICH HAS CAREFULLY SCRUTINIZED, ON THE BASIS OF THE ENTIRE RECORD, THE PROSECUTOR'S REASONS FOR EXCLUDING BLACK JURORS

As previously noted, the Court of Criminal Appeals expressed severe reservations regarding the prosecution's explanations for peremptorily striking three black members of the venire. It nevertheless deferred to the trial judge's conclusions and declined to examine evidence of disparate racial treatment contained in the record and outlined in petitioner's Supplemental Brief. By misunderstanding its duty to engage in a full review of the record in order to ascertain whether the trial court's findings were based upon careful scrutiny of the prosecutor's explanations

for excluding black jurors, the appellate court eviscerated this Court's holding in Batson.

In Batson, this Court noted

> that 'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. Anderson v. Bessemer, 470 U.S. 564, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). Since the trial judge's findings in the context [of racial discrimination in a prosecutor's use of peremptory juror strikes] largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. Id. at 575-6, 84 L. Ed.2d 518, 105 S.Ct. 1504.

476 U.S. at 98 n.21. However, the deference required by Anderson v. Bessemer, 470 U.S. 564 (1985) cannot be construed to compromise the scrutiny required by Batson. At the very least, Bessemer adopts the "clearly erroneous" standard of United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), which holds that "[a] finding is 'clearly

erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis added.)

Thus, contrary to the approach below, whatever deference is owed by an appellate court to a trial court is clearly contingent on the appellate court's review of the entire record in order to ascertain that the trial court's findings have been based upon careful scrutiny of the prosecutor's explanations for excluding black jurors. Indeed, this Court has often engaged in a similar form of review in other cases of alleged discrimination in the selection of juries. See Norris v. Alabama, 294 U.S. 587 (1935); Avery v. Georgia, 345 U.S.

559 (1953).[15]

If the appellate court determines that the trial court has scrutinized the entire record, appropriate deference must be given to the trial court's fact-findings. However, if the appellate court

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15/ In both Norris and Avery, the prosecution objected to any review of the facts by this Court. In Norris, the Court responded:

> That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied.... If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.

294 U.S. at 589-90 (citation omitted). In Avery, the Court cited Norris, noting that the Court's reconsideration of the facts must be "based on our independent analysis of the record." 345 U.S. at 561. See also Fiske v. Kansas, 274 U.S. 380, 385-6 (1927); Time Inc. v. Pape, 401 U.S. 279, 284 (1971); and Buckley v. Littell, 539 F.2d 882, 888 (1976)(holding that review of evidence applies at all levels of appellate review).

determines that the trial court has failed to scrutinize the entire record, no deference can be given to the trial court's fact-findings, and the appellate court must remand for a new fact-finding proceeding or, if the record permits, make the fact-findings supported by the record. Unless appellate review conforms to these principles, the rights secured by Batson will be lost. It is, therefore, "incumbent upon [the appellate courts] to analyze the facts in order that the appropriate enforcement of the federal right may be assured." Norris v. Alabama, 294 U.S. at 590.

Here, the Texas Court of Criminal Appeals rejected the trial court's reasoning but rubber stamped the result. Its own opinion documented the ways in which the trial court had failed to scrutinize the prosecutor's explanations

for the exclusion of black jurors on the basis of the entire record. Not realizing that the trial court was bound by Batson to have done so, see n.10, supra, the appellate court did not understand its own duty, under Batson, to give no deference to the trial court's fact-findings. Its obligation under Batson -- on this record -- required it to find that the prosecutor's "neutral" explanations disguised his true racial motivation. Its failure to fulfill its obligation violated petitioner's federal constitutional rights, and made a mockery of Batson.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

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PHILLIP D. TOMPKINS,
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v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. *BATSON v. KENTUCKY* REAFFIRMS LONG-ESTABLISHED PRECEDENT THAT JURY SELECTION MUST BE TOTALLY RACE NEUTRAL	5
II. THE TRIAL COURT ABDICATED ITS RESPONSIBILITY TO EVAULATE THE LEGITIMACY OF THE PROSECUTOR'S EXPLANATION OF PEREMPTORY CHALLENGES AGAINST WHICH A PRIMA FACIE CASE HAD BEEN MADE	9
A. The Trial Court Must Actively Scrutinize The Prosecutor's Explanation For Pretext And Mixed Motives	9
B. The Trial Court Utterly Failed To Fulfill Its Duty To Determine The Legitimacy Of The Prosecutor's Explanations	15
C. The Trial Court May Consider Only The Prosecutor's Actual Reasons For Challenge..	18
III. THE APPELLATE COURT APPLIED INCORRECT STANDARDS OF REVIEW	19
A. The Court Of Criminal Appeals Failed To Review The Legal Sufficiency Of The Trial Court's Findings	20
B. The Court Of Criminal Appeals Erred By Reviewing The Trial Court's Findings According To A "Rational Basis" Standard, Instead Of The "Clearly Erroneous" Standard Required By *Batson*	22

TABLE OF CONTENTS—Continued

	Page
1. The Court Of Criminal Appeals Failed To Review The Entire Record Before Upholding The Trial Court's Findings Regarding The Prosecutor's Intent	24
2. The Court Of Criminal Appeals Failed To Hold The Trial Court's Findings Clearly Erroneous, Despite Its Conviction That Those Findings Were Not Credible	25
CONCLUSION	28

TABLE OF AUTHORITIES

CASES	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	12
Alexander v. Louisiana, 405 U.S. 625 (1972)	4, 5, 9, 11
Amadeo v. Zant, 108 S. Ct. 1771 (1988)	24
Anderson v. Bessemer City, 470 U.S. 564 (1985)	5, 23, 27
Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977)	4, 8, 9, 15
Batson v. Kentucky, 476 U.S. 79 (1986)	*passim*
Bose Corp., Inc. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)	21, 24
Cassell v. Texas, 339 U.S. 282 (1950)	6
Commonwealth v. DiMatteo, 12 Mass. App. Ct. 547, 427 N.E.2d 754 (1988)	14
Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499, *cert. denied*, 444 U.S. 881 (1979)	14
Ex parte Branch, No. 86-500, slip op. (Ala. Dec. 4, 1987)	10, 23
Ex parte Virginia, 100 U.S. 339 (1880)	5
Floyd v. State, 511 So. 2d 762 (Fla. 1987)	13
Gamble v. State, 257 Ga. 325, 357 S.E.2d 792 (1987)	10, 14
Garrett v. Morris, 815 F.2d 509 (8th Cir.), *cert. denied sub nom. Jones v. Garrett*, 108 S. Ct. 233 (1987)	10, 13
Gray v. Mississippi, 107 S. Ct. 2045 (1987)	21
Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988)	8
Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982)	23
Jackson v. Virginia, 443 U.S. 307 (1979)	20
Johnson v. State, No. 57,526, slip op. (Miss. May 18, 1988) (en banc)	23
McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)	8, 12
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	4, 11, 12
Norris v. Alabama, 294 U.S. 587 (1935)	4, 11, 20
People v. Hall, 35 Cal. 3d 161, 672 P.2d 854 (1983)	10, 13

TABLE OF AUTHORITIES—Continued

	Page
People v. Trevino, 39 Cal. 3d 667, 704 P.2d 719 (1985)	13, 14
People v. Turner, 42 Cal. 3d 711, 726 P.2d 102 (1986)	13
People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978)	13, 14
Peters v. Kiff, 407 U.S. 493 (1972)	11
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	21
Rogers v. Richmond, 365 U.S. 534 (1961)	21
Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987)	13, 14
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	20
Schuessler v. State, 719 S.W.2d 320 (Tex. Crim. App. 1986)	23
State v. Alvarado, 226 Neb. 195, 410 N.W.2d 118 (1987)	23
State v. Antwine, 743 S.W.2d 51 (Mo. 1987), *cert. denied*, 108 S. Ct. 1755 (1988)	10
State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986)	10, 14
State v. Gonzalez, 206 Conn. 391, 538 A.2d 210 (1988)	24
State v. Jackson, No. 477A87, slip op. (N.C. May 5, 1988)	23
State v. Slappy, 522 So. 2d 18 (Fla. 1988)	13, 14
Stone v. Powell, 428 U.S. 465 (1976)	24
Strauder v. West Virginia, 100 U.S. 303 (1880)	5
Swain v. Alabama, 380 U.S. 202 (1965)	3
Texas v. Mead, 465 U.S. 1041 (1983)	19
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	11, 12, 18
Time, Inc. v. Firestone, 424 U.S. 448 (1976)	21
United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987)	14
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	5, 23, 27
Van Guilder v. State, 709 S.W.2d 178 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 2891 (1986)	23
Wainwright v. Witt, 469 U.S. 412 (1985)	15
Washington v. Davis, 426 U.S. 229 (1976)	4, 8

TABLE OF AUTHORITIES—Continued

	Page
Whitus v. Georgia, 385 U.S. 545 (1967)	6, 11, 20
Younger v. Harris, 401 U.S. 37 (1971)	19
RULE AND STATUTES	
Supreme Court Rule 36.2	2
28 U.S.C. §§ 2254(b), (d)	20
ARTICLE	
Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985)	21

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure the civil rights of all Americans. During the last 25 years the Lawyers' Committee and its local affiliates have enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor. The Committee's membership today includes former United States Attorneys General and Solicitors General, past presidents of the American Bar Association, a number of law school deans and many of the nation's leading lawyers. The widespread perception that prosecutors have exercised peremptory challenges in a discriminatory manner, and the

importance of the principle of equal justice under law, prompted the Lawyers' Committee to file a brief *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986). The same concerns, coupled with the fact that the *Batson* principles will remain extremely fragile until this Court provides more guidance concerning their implementation, prompt the Lawyers' Committee to file a brief *amicus curiae* in support of petitioner in this case. The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

STATEMENT OF THE CASE

Petitioner Phillip Daniel Tompkins, a black man, was convicted by a Texas jury of capital murder, based on his alleged intentional killing of a white woman while in the course of committing or attemptin, to commit robbery and kidnapping. (J.A. 56.) He was sentenced to death. (J.A. 56.)

The venire at petitioner's trial included thirteen blacks. Of these prospective black jurors, eight were challenged for cause. The remaining five black venirepersons were excluded by the prosecutor's peremptory challenge. Petitioner objected and moved to quash the jury on grounds that the prosecution had exercised its peremptory strikes to purposefully exclude venirepersons on the basis of race. The trial court overruled petitioner's motion, and did not inquire into the State's reasons for striking all the black venirepersons. (J.A. 57-58.)

While petitioner's appeal was pending review by the Court of Criminal Appeals of Texas, this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986). In April 1987, the reviewing court abated the appeal, and sent the case back to the trial court with instructions to conduct a *Batson* hearing. Following that hearing, the trial court ruled that although petitioner had made a *prima facie* showing of prosecutorial discrimination in the exercise of

peremptory challenges, that showing had been rebutted by the State's explanations for the suspect peremptory strikes. (J.A. 47-49.)

The Court of Criminal Appeals affirmed the trial court's *Batson* findings and petitioner's conviction, rejecting petitioner's constitutional claim under *Batson* on the ground that the trial court had not acted irrationally in finding that there was no discrimination. (J.A. 72-73.)

SUMMARY OF ARGUMENT

This case raises squarely the question of whether the increased protection for defendants' fourteenth amendment rights which the Court mandated in *Batson v. Kentucky*, 476 U.S. 79 (1986) will be vitiated by ineffective trial court procedures and overly deferential appellate review. In *Batson*, this Court once again acknowledged that "[d]iscrimination within the judicial system is [the] most pernicious," *id.* at 87-88, and that the potential for such discrimination is especially great in connection with prosecutors' exercise of peremptory challenges. *Id.* at 96.

In response to this continuing threat, *Batson* altered the twenty-year-old evidentiary ruling of *Swain v. Alabama*, 380 U.S. 202 (1965), to allow a defendant to rely on evidence from his own trial to establish a *prima facie* inference of discrimination in the prosecutor's use of peremptory challenges. Once established, the burden then shifts to the State to justify the suspect challenge by articulating "a [legitimate] neutral explanation related to the particular case to be tried." *Batson*, 476 U.S. at 98.

Having established the legal standards and the general framework within which they should be applied, however, the *Batson* court left important procedural questions unanswered. *Id.* at 99. Justice White's prediction —that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today"

id. at 102 (White, J., concurring)—has proven correct. Now, two years later, the Court must return to the *Batson* problem and provide further guidance, without which clearly unconstitutional peremptory challenges such as those at issue here will be effectively immunized by inadequate judicial scrutiny.

Petitioner Tompkins' conviction should be held constitutionally defective under *Batson* on three separate grounds. First, the decisions of the Texas courts were apparently premised on the incorrect belief that peremptory challenges based in part, though not solely, on racial grounds are permissible under *Batson*. This Court has repeatedly held that where an individual's fourteenth amendment right to equal protection is threatened, conduct based on mixed racial and nonracial motives is not insulated from challenge. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *cf. Washington v. Davis*, 426 U.S. 229, 240-42 (1976). Mixed-motive explanations are especially dangerous where, as in the case of peremptory challenges, nonracial reasons may be easily generated. To allow anything but *totally* nonracial explanations would rapidly undermine *Batson*'s protections.

Second, the trial court made factual findings that were clearly insufficient as a matter of law. The *Tompkins* trial court abdicated its obligation to ascertain the legitimacy of the prosecutor's justifications in light of *Batson*'s requirement that such explanations be racially neutral, non-speculative and logically related to the particular case. *Batson*, 476 U.S. at 98. The lower court accepted the prosecutor's rebuttal at face value, thereby violating that court's duty to probe nonracial justifications for pretext in light of the evidence and circumstances of the case. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973); *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972); *Norris v. Alabama*, 294 U.S. 587, 593-96 (1935). Were trial courts not required to make an earnest attempt to judge the legal sufficiency and legitimacy of prosecutors' rebuttal the equal protection rights safeguarded by *Batson* would be meaningless.

Finally, the Texas Court of Criminal Appeals erred both by failing to review the legal sufficiency of the trial court's determination, and by failing to apply a "clearly erroneous" standard of review. In the first instance, the appellate court inappropriately deferred to the trial court's finding that the prosecutor lacked discriminatory intent, even though such finding was based on an obvious misapplication of federal law. Second, the reviewing court failed to employ the "clearly erroneous" standard of review contemplated by *Batson*. 476 U.S. 98 n.21. Contrary to its obligation, the appeals court deferred blindly to the court below, even though its independent examination of the record "cast considerable doubt upon the neutral explanations offered by counsel for the State." (J.A. 66 n.6A.) *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

ARGUMENT

I. *BATSON v. KENTUCKY* REAFFIRMS LONG-ESTABLISHED PRECEDENT THAT JURY SELECTION MUST BE TOTALLY RACE NEUTRAL

An unbroken line of cases, beginning over a century ago, has held that the Equal Protection Clause demands that a person's ability to serve on a jury be evaluated exclusively in terms of individual characteristics, rather than in terms of racial identity. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880).[1] *Batson v. Kentucky*, 476 U.S. 76 (1986)

[1] *See, e.g., Alexander v. Louisiana*, 405 U.S. 625, 632 (1972) (holding that in order to constitutionally validate a *prima facie* case of discrimination in venire selection the state must show that "permissible racially neutral selection criteria and procedures have produced

reaffirmed this promise of equal protection, by requiring that where an inference of discrimination is raised by prosecutors' use of peremptory challenges, the State may validate the suspect challenge only by providing specific, logical and entirely nonracial reasons. Prosecutors are duty bound "to exercise their challenges only for legitimate purposes." 476 U.S. at 99 n.22. Thus, once a defendant has made a *prima facie* showing that the prosecutor exercised his peremptory challenges in a discriminatory manner, the prosecutor "must articulate a neutral explanation" for his strikes. *Id.* at 98.

Batson's requirement of racial neutrality must be construed to validate only those challenges that are motivated *entirely* by nonracial reasons. In *Tompkins*, the Texas Court of Criminal Appeals implies that even though challenges based on racial grounds *alone* are prohibited by *Batson*, challenges that are based on both racial *and* nonracial grounds may be permissible. The appellate court stated that if the prosecutor "admits a racially motivated reason for exclusion, *without more*, the trial judge should never find" that strike constitutional. (Emphasis added.) (J.A. 65 n.6.) The appellate court further stated that a defendant's *prima facie* showing of discrimination would stand unless the prosecutor "could come forward and demonstrate *some* 'neutral'—non-race related—explanation . . . ." (Emphasis added.) (J.A. 61.) That court concluded that no constitutional violation had occurred at trial, because the trial judge "found, implicitly, that the prosecuting attorneys did not exercise their peremptories against the five black venirepersons complained about *solely* on account of their race. . . ." (Emphasis added.) (J.A. 62.)

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the monochromatic result"); *Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (holding that in venire selection procedures, where "the opportunity for discrimination was present . . . it [must not be] resorted to"); *Cassell v. Texas*, 339 U.S. 282, 286 (1950) (holding that "[j]urymen should be selected as individuals on the basis of individual qualifications, and not as members of a race").

While the above opinion language may not conclusively demonstrate that the Texas courts have misread *Batson*,[2] the transcript of the *Batson* hearing in this case leaves little doubt on the point. Throughout the trial court's interrogation, the prosecutors freely and repeatedly conceded that even *after* this Court's decision in *Batson* it was the practice of the Harris County District Attorney's office to exercise their peremptory challenges based in part on considerations of race.[3]

The Texas courts' interpretation of *Batson* is manifestly incorrect. *Batson* cannot fairly be read to allow challenges which are based, *even in part*, on assumptions that rely on race to judge an individual's fitness as a juror. If race-based assumptions contribute in any way to the prosecutor's decision to use a peremptory challenge, the State's reasons are not neutral—as *Batson* expressly requires—and the strike violates the Equal Protection Clause. To allow anything but totally non-

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[2] Indeed, although *Batson* is replete with references to the principle that the prosecutor's explanation of suspect challenges must be racially neutral, this Court's opinion does contain language practically identical to the last of the above quotations. 476 U.S. at 89.

[3] Testimony elicited from Harris County District Attorneys at the *Batson* hearing confirms that the race of veniremembers played a part in those prosecutors' decisions to retain or strike an individual, even though race may not have been the sole basis for exclusion. One prosecutor, when asked whether race would "enter into [his] decision . . . to use a peremptory challenge," answered that he "would not exclude that person solely because of his race." When reminded that he was asked whether "it would enter into [his] decision making process" he responded: "Oh, certainly. Certainly." Supp. R. vol. 1, 32-33. Indeed, Thomas Royce, the prosecutor who exercised two of the three disputed peremptory challenges, agreed that in selecting juries he presumed that blacks as a group were more inclined to be sympathetic and lenient towards black defendants. *Id.* at 156, 162. Other members of the District Attorneys' office noted that, in general, "there was a caution exercised when dealing with minorities," *id.* at 182, and that "many of those people have preconceived notions about law enforcement and government." *Id.* at 184.

racial explanations would quickly subvert *Batson*'s promise of discrimination-free peremptory challenges.[4]

This conclusion is inescapable in light of this Court's repeated rejection of mixed-motive explanations in other contexts. In *Arlington Heights v. Metropolitan Housing Dev. Corp.*, the Court noted that racial discrimination need not be the "sole," "primary," or "dominant" factor in an official decision for the Equal Protection Clause to be violated. It is enough that "a discriminatory purpose has been a motivating factor." 429 U.S. 252, 265-66 (1977).[5] *Cf. Washington v. Davis*, 426 U.S. 229, 240-42 (1976). Where the constitutional right to equal protection is threatened, therefore, mixed-motive explanations will simply not suffice.

The standard applied by the Texas courts to the sufficiency of the State's explanation of its peremptory challenges was thus fundamentally defective. Contrary to those courts' apparent understanding, a peremptory challenge need not be based "*solely*" on racial considerations to be constitutionally impermissible. Where assumptions based on race play even a minor part in the prosecutor's decision to strike a potential juror, that chal-

[4] As Justice Marshall observed in *Batson*: "Any prosecutor can easily assert facially neutral reasons for striking a juror . . . . If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected today may be illusory." 476 U.S. at 106 (Marshall, J., concurring).

[5] The principle that mixed-motive explanations are not sufficient to rebut a *prima facie* case of discrimination is also found in Title VII case law. *See, e.g., McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976)(noting that a Title VII plaintiff need not prove that he was "rejected or discharged solely on the basis of his race"); *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988) (holding that mixed-motive explanations are insufficient to rebut the inference of impermissible gender discrimination in employment decision).

lenge is tainted. To satisfy *Batson*, the state's explanation must convince the trial court that the race of the juror had no bearing whatsoever on the decision to strike.

II. THE TRIAL COURT ABDICATED ITS RESPONSIBILITY TO EVALUATE THE LEGITIMACY OF THE PROSECUTOR'S EXPLANATION OF PEREMPTORY CHALLENGES AGAINST WHICH A PRIMA FACIE CASE HAD BEEN MADE

A. The Trial Court Must Actively Scrutinize The Prosecutor's Explanation For Pretext And Mixed Motives

Batson charged trial courts with responsibility for ensuring that prosecutors exercise their peremptory challenges for only legitimate, race-neutral purposes. *Batson*, 476 U.S. at 98-99. Accordingly, trial courts are required "to be sensitive to the racially discriminatory use of peremptory challenges." *Id.* at 99. This obligation to scrutinize thoroughly the State's conduct for discriminatory purpose is not new to equal protection doctrine. As this Court stated in *Arlington Heights*, 429 U.S. at 266 "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Where discriminatory motives are alleged to underlie official decisions, the trial court has an active role in "examin[ing] the purpose underlying the decision." *Id.* at 268. *See also Alexander v. Louisiana*, 405 U.S. 625, 630 (1971) (trial courts may find it necessary to undertake a "factual inquiry" that "takes into account all possible explanatory factors").

Under *Batson*, a defendant alleging the impermissible exclusion of veniremembers "may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. . . . Once the defendant makes

the requisite showing, the burden shifts to the State to explain adequately the racial exclusion." 476 U.S. at 93-94. Accordingly, the adequacy of the prosecutor's rebuttal explanation must be tested by the trial court. To ensure that only legitimate explanations are accepted, the trial court's inquiry must be designed to distinguish sincere from contrived reasons, and wholly nonracial from mixed motives.[6]

To fulfill its *Batson* obligations the trial judge must take the initiative to evaluate each proffered explanation in light of the factual and legal issues in the case, his observation of the prosecutor's *voir dire* and his knowledge of trial techniques. This role is fully consistent with *Batson*'s requirement that trial courts be "alert" and "sensitive" to racially discriminatory challenges while supervising *voir dire*. 476 U.S. at 99, n.22.[7]

An active role for the trial court is also suggested by numerous prior holdings of this Court that once a *prima facie* inference of discrimination is raised, a probing

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[6] *See, e.g., Garrett v. Morris*, 815 F.2d 509, 511 (8th Cir.), *cert. denied sub nom. Jones v. Garrett*, 108 S. Ct. 233 (1987) ("the court has a duty to satisfy itself that the prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination"); *People v. Hall*, 35 Cal. 3d 161, 167, 672 P.2d 854, 858 (1983) ("[I]t is imperative, if the constitutional guarantee is to have any real meaning, that . . . the allegedly offending party . . . come forward with explanation to the court that demonstrates other bases for the challenges *and* that the court satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation.") (Emphasis in original.)

[7] *See Garrett v. Morris*, 815 F.2d at 511; *Ex parte Branch*, No. 86-500 slip op. at 21-22 (Ala. Dec. 4, 1988); *People v. Hall*, 35 Cal. 3d at 167, 672 P.2d at 858; *Gamble v. State*, 257 Ga. 325, 327, 357 S.E.2d 792, 794-95 (1987); *State v. Antwine*, 743 S.W.2d 51, 64-65 (Mo. 1987), *cert. denied*, 108 S. Ct. 1775 (1988); *State v. Gilmore*, 103 N.J. 508, 536-37, 511 A.2d 1150, 1164-65 (1986).

review of assertedly reasonable and neutral conduct is necessary. Such is the teaching of *Norris v. Alabama*, 294 U.S. 587, 593-96 (1935) which found the State's rebuttal of a *prima facie* inference of discrimination in the selection of jury venires inadequate when that explanation was considered in light of the evidence in the record. The sufficiency of the rebuttal must be assessed in view of the entire circumstances as they have been presented. *See Alexander v. Louisiana*, 405 U.S. at 632; *Whitus v. Georgia*, 385 U.S. 545, 550-51 (1967).

Likewise, in the employment discrimination context, this Court has consistently ruled that the inquiry into a complainant's *prima facie* case of discriminatory employment practices or treatment is not complete once an employer presents his explanation. The court's inquiry must also consider whether the "stated reason . . . was in fact pretext." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1972); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981).

In criminal prosecutions, earnest trial court scrutiny of the legitimacy of the prosecution's explanation of its peremptory challenges is especially crucial.[8] Exclusion of a cognizable class "may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-504 (1972). Certainly in petitioner's case, where he faces a sentence of death, the consequences of constitutionally impermissible discrimination in jury selection could not be greater. To require less than the closest scrutiny of a prosecutor's explanation would transform the *Batson* inquiry into a mere formality.

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[8] The trial court's duty to probe the State's rationale is especially critical where, as here, defense counsel was not afforded a meaningful opportunity to rebut the prosecutor's explanation. Even though defense counsel had no way of anticipating the explanations the prosecutor would offer at the *Batson* hearing, the trial court required that defense comment on the prosecutor's explanations be made within a few days of the *Batson* hearing's close, but 2½ weeks before the record was transcribed. Supp. R. vol. 1 at 227-28.

The trial court must, first, elicit all of the prosecutor's reasons for a suspect strike, in order to ensure that mixed motives are not present. To require less than *all* of the prosecutor's actual reasons would enable the state to sustain impermissible mixed-motive strikes by identifying a single nonracial consideration. Once all of the prosecutor's reasons have been elicited and determined, at least facially, to arise from completely nonracial motives, the trial court must assure that each rationale is legitimate and not pretextual. *Batson* requires that each legitimate explanation be "neutral" and "related to the particular case to be tried." 476 U.S. at 98.[9] These criteria are most effectively tested by considering, generally (1) whether similarly situated white and minority veniremembers were treated differently, and (2) whether the justification for challenge was legally or factually relevant to the case at bar.

Analogous factors were credited by this Court in *McDonnell Douglas v. Green*, 411 U.S. at 804, and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282-83 (1976), where evidence that similarly situated white and black employees were treated differently was considered especially relevant to the showing of pretext in the Title VII context. Likewise, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) held that where employers are required to show that an employment practice bears a job-related reason, such reason must be judged to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job."

To satisfy their duties under *Batson*, therefore, trial courts must conduct an independent inquiry sufficient to ensure that the state's explanations are legitimate,

[9] *Batson* further noted that "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." 476 U.S. at 98 n.20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 258).

racially neutral and logically related to the case. At a minimum, the trial court should undertake a detailed *sua sponte* examination of whether: (a) minority veniremembers were stricken, while similarly situated white venirepersons escaped challenge;[10] (b) the *voir dire* of minority venirepersons appeared designed to elicit a particular response, and similar examination was not undertaken of white venirepersons;[11] (c) the challenged venireperson was examined in a perfunctory manner, if at all;[12] and

[10] *Roman v. Abrams*, 822 F.2d 214, 228 (2d Cir. 1987) (dissimilar treatment raises suspicion that reason is pretextual); *Garrett v. Morris*, 815 F.2d at 514 (challenges based on "lack of education, background, and knowledge" were invalid where whites with similar backgrounds survived challenge); *People v. Trevino*, 39 Cal. 3d 667, 691-92, 704 P.2d 719, 733 (1985) (challenges of Hispanic surnamed venirepersons invalid where similarly situated whites expressed similar ambivalence towards the death penalty but went unchallenged); *State v. Slappy*, 522 So. 2d 18, 19-20 (Fla. 1988) (peremptory challenge invalid where prosecutor explained that a black elementary school teacher was struck as possibly being too liberal while a white elementary school teacher was not challenged); *Floyd v. State*, 511 So. 2d 762, 765 (Fla. 1987) (where prosecutor struck black veniremember because he was a student, failure to strike a white student was "strong evidence" that the reason was "a subterfuge to avoid admitting discriminatory use of the peremptory challenge").

[11] *People v. Turner*, 42 Cal. 3d 711, 726-27, 726 P.2d 102, 111 (1986) (minority venireperson struck because of single, ambiguous response to prosecutor's question); *People v. Hall*, 35 Cal. 3d at 165, 672 P.2d at 856 (only minority venirepersons were asked where they grew up which served as basis for exclusion).

[12] *Garrett v. Morris*, 815 F.2d at 514 (prosecutor's reasons pretextual when he had not explored in *voir dire* the purported basis for challenge); *People v. Turner*, 42 Cal. 3d at 714, 726 P.2d at 111 ("prosecutor's failure to engage . . . 'in more than desultory voir dire . . .' is one factor supporting an inference that the challenge is in fact based on group bias"); *People v. Wheeler*, 22 Cal. 3d 258, 281, 583 P.2d 748, 764 (1978) ("the failure of [the prosecutor] . . . to engage these jurors in more than desultory *voir dire*" may support the demonstration of discrimination); *State v. Slappy*, 522 So. 2d at 23 n.2 (where two black veniremembers excused without

(d) the explanation offered by the State was not logically related to the elements of the offense.[13]

In this last regard, it is essential that a logical correlation is established between the prosecutor's rationale and the legal issues and facts as they are known at the time of *voir dire*. This inquiry is not simply an evaluation

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questioning, the safeguards would be "meaningless . . . if, by simply declining to ask any questions at all, the state could excuse all blacks from the venire"); *Gamble v. State*, 257 Ga. at 329-30, 357 S.E.2d at 795 (prosecutor's explanations invalid where no *voir dire* of challenged venireperson).

[13] *Roman v. Abrams*, 822 F.2d at 228 (prospective jurors' knowledge of computers, electronics, and bookkeeping not basis for exclusion on grounds that they may not be able to accept reasonable doubt standard of proof); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (unspecified dissatisfaction with venireperson's background and juror's questionnaire not acceptable grounds for exclusion); *People v. Trevino*, 39 Cal. 3d at 689, 704 P.2d at 731 (prosecutor must show venireperson's "specific bias," *i.e.*, "bias relating to the particular case on trial or the parties or witnesses thereto" (quoting *People v. Wheeler*, 22 Cal. 3d at 276, 583 P.2d at 761)); *People v. Wheeler*, 22 Cal. 3d at 282, 583 P.2d 748, 765 (1978) (burden of justification will be satisfied where prosecutor explains suspect challenges on grounds that are "reasonably relevant to the particular case on trial or its parties or witnesses—*i.e.*, for reasons of specific bias"); *State v. Slappy*, 522 So. 2d at 20, 23 (invalid strike where prosecutor stated that challenged veniremember was too liberal because she was a school teacher but failed to demonstrate that she shared that trait); *Gamble v. State*, 257 Ga. at 328, 357 S.E.2d at 795-96 (exclusion of potential juror because he is a Mason invalid where "it is not clear how Masonic membership is related to this case"); *Commonwealth v. Soares*, 377 Mass. 461, 485, 387 N.E.2d 499, 514 (1979) (peremptory challenges valid where a juror's "unique relationship to the particular case raises the spectre of individual bias"); *Commonwealth v. DiMatteo*, 12 Mass. App. Ct. 547, 552-53, 427 N.E.2d 754, 757 (1981) (widowhood an insufficient indicator of bias in a trial for armed robbery of a service station); *State v. Gilmore*, 103 N.J. at 542, 511 A.2d at 1168 (purported lack of intelligence not grounds for challenge where issues to be resolved by the jury do not demand "high intellectual achievement of the jurors" (quoting *State v. Gilmore*, 199 N.J. Super. 389, 411-12, 489 A.2d 1175, 1187 (1985))).

of the prosecutor's credibility as a witness during the *Batson* hearing. Nor is the judge merely "applying some kind of legal standard to what he sees and hears," as the judge does, for example, when he determines juror bias against the death penalty. *See Wainwright v. Witt*, 469 U.S. 412, 429 (1985). Rather, the prosecutor's explanation must be rationally and analytically related to the case being tried.

Finally, the trial court's formal findings must supply sufficient detail to assure that upon review the basis for each *Batson*-related conclusion is clear. Absent such explanation, a reviewing court will lack the necessary understanding to distinguish those findings entitled to great deference from those which are not.

B. The Trial Court Utterly Failed To Fulfill Its Duty To Determine The Legitimacy Of The Prosecutor's Explanations

In *Tompkins*, the trial court completely abdicated its *Batson* obligations. The repetitious and conclusory nature of the court's findings is itself a strong indication that the State's rebuttal explanations were accepted on their face. In each instance, the court recited as if by rote that "the State's excusal . . . was neutral, relative, clear and legitimate as required by *Batson* and was not racially motivated." (J.A. 47-49.) When the stated basis for those findings is examined, the court's failure to evaluate independently the State's explanations is obvious with respect to three of the five veniremembers challenged peremptorily. In each case, the record reflects that the prosecutor's explanations were neither neutral nor logically related to the matter at bar.[14]

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[14] Although in this case three peremptory challenges are suspect, it should be noted that the improper exclusion of only one of the veniremembers would be constitutionally offensive. As *Batson* stated: " 'A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions'." 476 U.S. at 95 (quoting *Arlington Heights*, 429 U.S. at 266, n.14).

(i) Isabella Thomas was purportedly challenged because she had "problems" following the law of circumstantial evidence. Supp. R. vol. 1, 109. The trial court accepted this rationale without the slightest attention to its adequacy. When tested, the proffered explanation is plainly insufficient to overcome the defendant's *prima facie* inference. First, at the time the strike was exercised the prosecutor's case was based on direct evidence. (J.A. 68.) Hence, the law of circumstantial evidence was not relevant or sufficiently correlated to the case to be a proper basis for challenge. Second, Ms. Thomas' problematic responses were elicited through the prosecutor's own confused hypothetical; when the questions were clarified, Thomas responded without problem.[15] Finally, similarly situated white veniremembers also responded with difficulty to questions pertaining to the laws of circumstantial evidence, intent and causation, but went unchallenged. R. vol. 11, 1550-53; R. vol. 6, 316-19; R. vol. 15, 2261-65.

(ii) Leroy Green was purportedly challenged because he was a postal employee, and because he responded nonverbally. Supp. R. vol. 1, 208-18. Again, this explanation does not even come close to meeting *Batson*'s requirements. The prosecutor never explained how postal employees as a group were biased, in what way Green shared that bias or how any such bias was related to the case. Indeed, no such explanation is logically possible.[16]

[15] The prosecutor asked Ms. Thomas whether she could find someone guilty of burglary if he was caught several days after the crime with the victim's property. Ms. Thomas responded negatively. After further explanation, she responded that she could if "shown all the possibilities beyond a reasonable doubt." R. vol. 9, 1006-11.

[16] Neither of the Texas courts who considered this rationale found it plausible. Although the appellate court found that Green "was . . . struck solely . . . because he had been an employee of the United States Postal Service for some thirteen years . . ." (J.A. 70-71), the trial judge omitted all reference to this part of the State's explanation from its "Findings of Fact and Conclusions of Law." (J.A. 49.)

The remainder of the State's explanation cannot be considered race-neutral, since similarly situated white venirepersons were not challenged even though they also responded to questions nonverbally.[17]

(iii) Frank Samuel was purportedly challenged because he appeared to be illiterate, a conclusion based on the prosecutor's suspicion that his data sheet might have been filled out by another person, and because he responded to three questions by nodding. Supp. R. vol. 1, 135-43. This explanation is plainly insufficient. First, nearly a dozen unchallenged white veniremembers also responded nonverbally to examination.[18] Second, Samuel was never questioned directly on the subject of his literacy or about the data sheet. Indeed, at the *Batson* hearing the prosecutor acknowledged that Mr. Samuel could read when asked to do so at *voir dire*. Supp. R. vol. 1, 138. Further, the prosecutor undermined the veracity of this rationale by disputing, in another context, the importance and verifiability of the same questionnaire. Supp. R. vol. 1, 71.

The trial court, when faced with explanations that were clearly implausible or suggestive of bias, inexplicably failed to recognize its obligation to assess the legitimacy of these justifications. Rather than pursue further inquiry, or engage in a serious evaluation of their sufficiency, the court blindly accepted the explanations at face value. In so doing, the court woefully failed to meet the legal standard set forth in *Batson*.

[17] Nonverbal responses from unchallenged venirepersons are scattered throughout the *voir dire* transcript. Charles Vana, R. vol. 11, 1469, 1472; Denise Hollingsworth, R. vol. 11, 1544-47, 1556, 1565, R. vol. 12, 1590; William Wright, R. vol. 12, 1761-62, 1773; Sharon Miller, R. vol. 16, 1827-28, 1832, 1834, 1838, 1842-43, 1846; Carol Moore, R. vol. 16, 1885-86, 1890-91, 1903, 1917; Peggy Whitley, R. vol. 5, 172, 179, 186, 189, 192-93; and Curtis Sumrall, R. vol. 7, 500, 571, 588, 664, 672, all responded nonverbally.

[18] *See supra* note 17.

C. The Trial Court May Consider Only The Prosecutor's Actual Reasons For Challenge

Implementation of *Batson* presents special problems where, as here, prosecutors are unable to recall the precise basis for a suspect challenge. In *Tompkins*, the *Batson* hearing was held six years after the original *voir dire*. Situations such as these are particularly ripe for speculative, equivocal, and possibly disingenuous explanations.

The only satisfactory rebuttal of a *prima facie* showing of discriminatory purpose is testimony by the prosecutor of his *actual*, nonracial reason or reasons for peremptorily challenging the venireperson. Under *Batson*, a prosecutor must offer an "explanation of his 'legitimate reasons' for exercising the challenge." 476 U.S. at 95 n.20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 258). This standard is meaningless unless the prosecutor is obligated to present his actual reasons, and not simply his best guess. Explanations formulated in hindsight and composed largely of speculation or impressionistic reasoning cannot, as a general matter, fulfill the *Batson* obligations.

A trial court's invitation to speculate concerning facts of which the prosecutor has no honest recollection cannot fail to encourage calculated responses or selective recall that may consciously or unconsciously arise from prejudice. As Justice Marshall emphasized in *Batson*, such reasons may be easily generated, 476 U.S. at 106. Because *post hoc* reconstructions will, if accepted, inevitably erode the safeguards *Batson* was designed to erect, this Court should make explicit the logic of *Batson* that only by properly explaining its *actual* motivations may the State rebut a defendant's *prima facie* showing of discrimination.

The fact that the *Batson* hearing in the present case was fraught with examples of the prosecutor's specula-

tive reasoning[19] thus provides an independent ground for reversal.

III. THE APPELLATE COURT APPLIED INCORRECT STANDARDS OF REVIEW

Batson held that an appellate court should give "appropriate deference" to trial court findings of intentional discrimination. 476 U.S. at 98 n.21. The Texas Court of Criminal Appeals, however, was *blindly deferential* in this case to the trial court's finding that the State did not challenge any of five black venirepersons based on their race. Because the trial court's findings are determinative of petitioner's equal protection claim, this Court should declare erroneous the appellate court's lax review of those findings.[20]

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[19] For instance, when the prosecutor was asked whether she could recall why she asked a particular question of a challenged venireperson, the prosecutor responded: "No, I can just go on what it indicates from the questions and what I asked and the answers I got and from what I asked him here, which was unusual for me to ask, I have to assume there was a reason I asked it and that is the type of thing I would have asked if I were getting nonverbal communications coming from the person in the witness box." Supp. R. vol. 1, 224. Later, when asked why nonverbal responses to *voir dire* made her inclined to strike a venireperson, the prosecutor could only respond generally, "[t]here are all sorts of reasons that are nonverbal that give you a feeling about whether a juror would make a good juror in your case or how they feel about you or how you feel about them." Counsel responded: "Okay, you just don't remember. Is that correct?"; to which the prosecutor answered "Right, and if we had done it at the time . . ." *Id.* at 225.

[20] This Court's examination of the standards of appellate review applied by the Texas Court of Criminal Appeals in this case would not "unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Generally, a state appellate court is free, as a matter of state law, to decide the level of deference to accord to a trial court's factual findings. *Texas v. Mead*, 465 U.S. 1041, 1044 n.2 (1983) (Rehnquist, J., dissenting from denial of certiorari). Notwithstanding this freedom, however, where federal constitutional rights are concerned, a state court is

The Court of Criminal Appeals was overly deferential to the trial court's findings in two respects. First, the appellate court failed to review the legal sufficiency of the trial court's process for evaluating the legitimacy of the prosecutor's explanations, as required by *Batson*. Second, the Court of Criminal Appeals improperly applied a "rational basis" standard in its review of the trial court's findings, rather than the more stringent "clearly erroneous" standard called for in *Batson*.

A. The Court Of Criminal Appeals Failed To Review The Legal Sufficiency Of The Trial Court's Findings

The court of appeals failed to assure that the trial court's ultimate findings of no discrimination reflected the *Batson* requirements that the prosecutor's explanations be "legitimate," "neutral" and "related to the particular case to be tried." 476 U.S. at 98. As explained

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obligated to "consider federal claims in accord with federal law." *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

Where, as in the context of *Batson* challenges, the factual findings of a state trial court control the outcome of a defendant's federal constitutional claims, this Court has insisted on examining the adequacy of state appellate review. For example, this Court has independently examined evidence in cases concerning the exclusion of blacks from juries. The state appellate court's review of the trial court's fact-finding was closely scrutinized because, as in this case, the "conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former." *Norris v. Alabama*, 294 U.S. at 590; *see also Whitus v. Georgia*, 385 U.S. at 550. In federal habeas corpus proceedings, 28 U.S.C. §§ 2254(b), (d), federal courts are permitted to review state appellate court findings of evidentiary sufficiency to assure that state convictions have been secured in accord with the federal constitution. *Jackson v. Virginia*, 443 U.S. 307, 323 (1979). Otherwise, states might attempt to satisfy the "beyond a reasonable doubt" standard with nothing more than "a trial ritual." *Id.* at 316-17. Thus, where important constitutional rights are at stake, this Court may review both the facts found by state courts and the standards of state appellate review applied to such facts without offending principles of federalism.

above, the trial court must elicit and evaluate, as a predicate to its ultimate finding on intent, the prosecutor's explanation for each suspect challenge. The trial court's failure to conduct this evaluation in terms of the legal standards established by *Batson* necessarily invalidated the ultimate finding, and required the appellate court to set aside the trial court's finding that the prosecutor lacked discriminatory intent.

Deference to a finding of fact is not due where there has been no "conscious determination" by the trial court of the existence or nonexistence of critical subsidiary facts or legal conclusions. *Cf. Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976). Moreover, deference to a state trial court's factual finding is "inappropriate where . . . the trial court's findings are dependent on an apparent misapplication of federal law." *Gray v. Mississippi*, 107 S. Ct. 2045, 2053 n.10 (1987) (citing *Rogers v. Richmond*, 365 U.S. 534, 547 (1961)). The trial court's findings in this case clearly reflect an erroneous view of the requirements of *Batson*, and should have been set aside on that ground. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

A trial court's obligation under *Batson* to find legally sufficient facts attenuates the degree of deference that a reviewing court should give to the ultimate finding. *Cf. Bose Corp., Inc. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500 n.16 (1984) ("The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based."). Less deference is due when the sufficiency of the trial court's ultimate factual finding is based, in part, on legal conclusions.[21] In the *Batson* context, the trial court's ultimate intent finding "is inseparable from the principles through

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[21] "[W]hile 'what happened' may be viewed as a question of fact, the legal *sufficiency* of the evidence may be viewed as the equivalent of a question of law." Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 236 (emphasis in original).

which it is deduced," *id.* at 501 n.17, and should therefore be independently reviewed on appeal. *Id.*

In the present case, the Court of Criminal Appeals did not properly evaluate whether the trial court's findings were legally sufficient.[22] In fact, they were not. *See* discussion, *supra*, 15-17. Even the Court of Criminal Appeals recognized that at least one of the prosecutor's explanations, while nonracial, was so patently unrelated to the case as to be "shocking and totally not understandable" based on the record. (J.A. 68.) Nevertheless, apparently believing that it was bound to review only the trial court's ultimate factual findings—not the legal sufficiency of the court's underlying compliance with the *Batson* standards—the appellate court declined to overrule the court below.

The petitioner's conviction thus suffers from a wholesale abdication by the Texas courts of their judicial obligation to test the legal sufficiency of a proffered conclusion. Just as the trial court blindly accepted the prosecutor's explanation, so the court of appeals closed its eyes in undiscerning deference to the trier of fact's ultimate findings. Carried to its logical conclusion, the judicial philosophy of the courts below would allow a prosecutor to rebut a *prima facie* case through mere denial of discriminatory intent or affirmation of personal good faith; precisely the result that *Batson* expressly prohibits. 476 U.S. at 97-98.

B. The Court Of Criminal Appeals Erred By Reviewing The Trial Court's Findings According To A "Rational Basis" Standard, Instead Of The "Clearly Erroneous" Standard Required By *Batson*

Even assuming that the ultimate findings of the trial court were not legally deficient, the appellate court in-

[22] The error is made all the more obvious by the fact that the trial court, apparently recognizing the hybrid nature of its *Batson* hearing findings, styled them "Findings of Fact and Conclusions of Law." (J.A. 47.)

correctly applied a "rational basis" standard in reviewing the finding that the State's exercise of its peremptory challenges was not racially discriminatory. (J.A. 66 n.6A.) That standard would require reversal of the trial judge's findings of fact "only if no rational trier of fact could have failed to find his factual allegation true by a preponderance of the evidence." *Id.* at 8, citing *Van Guilder v. State*, 709 S.W.2d 178 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 2891 (1986); *Schuessler v. State*, 719 S.W.2d 320 (Tex. Crim. App. 1986). Because such a standard of review does not insure proper scrutiny of the basis for trial court findings regarding discrimination, it is inadequate to protect the fundamental rights guaranteed under *Batson*.

Indeed, this Court suggested in *Batson*, by referring to its opinion in *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985), that the appropriate level of appellate review for *Batson* findings of purposeful discrimination was the "clearly erroneous" standard. *Batson*, 476 U.S. at 98 n.21. The clearly erroneous standard requires, at a minimum, that an appellate court (1) review the *entire* record before assessing the validity of a trial court's factual findings and (2) hold the findings clearly erroneous when, based on the entire record the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982). The Court of Criminal Appeals failed to satisfy either of these requirements.[23]

[23] Numerous state supreme courts have adopted the clearly erroneous standard in reviewing the *Batson* hearing findings of trial courts. *See, e.g., Ex parte Branch*, No. 86-500 slip op. (Ala. May 13, 1988); *State v. Alvarado*, 410 N.W.2d 118 (Neb. 1987); *Johnson v. State*, No. 57,526 slip op. (Miss. May 18, 1988) (en banc). Other state supreme courts have applied ambiguous standards of review by referring to the high level of deference owed to trial court findings. *See, e.g., State v. Jackson*, No. 477A87 slip op. (N.C. May 5,

1. *The Court Of Criminal Appeals Failed To Review The Entire Record Before Upholding The Trial Court's Findings Regarding The Prosecutor's Intent*

The appellate court reviewed the record of this case selectively, to the detriment of petitioner's fourteenth amendment rights. The Court refused to consider the prosecutor's disparate treatment of similarly situated white and black venirepersons during *voir dire*, despite defense counsel's offer of such a comparison. (J.A. 66 n.6A.) The appellate court's failure to consider such evidence in the record is plainly contrary to the independent examination of the entire record contemplated by the clearly erroneous standard of appellate review. *Bose*, 466 U.S. at 499 (1984). The Court of Criminal Appeals mistakenly treated defense counsel's proposed comparison of evidence *already in the record* as new evidence. It thus failed to recognize that analysis of evidence in the record is well within the obligation of a reviewing court. *See, e.g., Amadeo v. Zant*, 108 S. Ct. 1771, 1777 (1988).

The Court of Criminal Appeals' failure to review the entire record in this regard was not a harmless procedural default: it was an egregious abdication of its responsibility to safeguard petitioner's constitutional rights. *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976). The appellate court recognized that defense counsel's comparison of similarly situated white and black venirepersons "cast considerable doubt upon the neutral explanations offered by counsel for the State," (J.A. 66 n.6A), and might have "materially affected the trial judge's ultimate findings of fact" had it been presented at the *Batson* hearing. *Id.* With its head firmly planted in the

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1988) (special deference); *State v. Gonzalez*, 206 Conn. 391 (1988) (great deference). This growing plethora of state standards can only be rationalized through the confirmation by this Court that the clearly erroneous standard is constitutionally required.

Texas sand, however, the court observed that "we do not consider this circumstance in reviewing the trial judge's findings in this cause." *Id.*

The appellate court's refusal to consider defense counsel's supplemental brief was not only perversely unjust; it was also patently illogical in light of the mechanics of the *Batson* hearing. The trial judge and defense counsel did not hear the prosecutor's race-neutral explanations for having struck certain venirepersons until the *Batson* hearing was held. By effectively requiring the defense counsel at the *Batson* hearing spontaneously to analyze multi-volume *voir dire* transcripts and to compare similarly situated white and black venirepersons vis-a-vis the prosecutor's explanation in order to preserve the evidentiary question on appeal, the appellate court placed an impossible burden on defense counsel. To disregard a compelling presentation of evidence on this basis, absent some legitimate procedural justification, is both unfair and impermissible under *Batson*. 476 U.S. at 96-98.

2. *The Court Of Criminal Appeals Failed To Hold The Trial Court's Findings Clearly Erroneous, Despite Its Conviction That Those Findings Were Not Credible*

The Court of Criminal Appeals accepted the trial court's intent findings even though the court felt, based on its own review of the record, that certain of the prosecutor's race-neutral explanations were not credible. This unwarranted degree of deference violates the clearly erroneous standard of review and undermines the degree of judicial inquiry contemplated by *Batson*.

As noted above, the record raises serious questions about the veracity and sufficiency of the prosecutor's explanations. The appeals court recognized the apparent inconsistencies in the trial court's findings. In the case of the prosecutor's strike on grounds that the venireperson had problems with the law of circumstantial evi-

dence, the appeals court described this explanation as "shocking and totally not understandable." (J.A. 68.) "Without more," the court continued, "we would have to hold that only an irrational trier of fact could have accepted this reason as a 'neutral explanation'." *Id.* Nonetheless, the court, on its own initiative, supplied further justification for the strike—that a jury instruction on circumstantial evidence would still have been a theoretical possibility.[24] In the case of the prosecutor's strike on grounds that the venireperson was a postal employee, the appeals court was given "great concern" (J.A. 70), because of the "difficulty in understanding the relevancy of a venireperson's employment as a postman . . . as far as

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[24] In the face of implausible and ambiguous facts in the record, the appellate court impermissibly supplemented the trial court's findings by engaging in its own speculation concerning the prosecutor's reasons for two of the suspect peremptories. First, with regard to the venireperson struck because of her reservations about circumstantial evidence, the appeals court substituted an imputed motive for the prosecutor's stated motive for exercising the peremptory challenge: "[W]e hold that the prosecuting attorney exercised a peremptory on the venireperson rather than risk a hung jury." (J.A. 70.) Second, the prosecutor struck a venireperson alleged to be illiterate. Yet it was the Court of Criminal Appeals, and not the prosecutor, that attempted to correlate this explanation to the case by concluding that the case was going to include "detailed written jury instructions" (J.A. 70), thus making the alleged illiteracy a legitimate basis for challenge. In fact, at the *Batson* hearing, the prosecutor admitted that the foreman jury charge was usually read to the jury. Supp. R. vol. 1, 144.

Faced with this clear failure by the State to meet its burden under *Batson*, the Court of Criminal Appeals should have moved without hesitation to set aside the conviction. If it is inconsistent with the values protected by *Batson* to allow the prosecution to speculate concerning his reasons for exercising a suspect peremptory challenge (*see* discussion, *supra*, at 18-19), it is all the more impermissible for a court of appeals far removed in time, space and orientation from the event at issue, to substitute its own "best guess" as to the State's motive. This error, also, constitutes an independent cause for reversal.

his qualifications for jury service." (J.A. 71.) However, the court overlooked not only this grave insufficiency, but also the fact that the trial court had not even mentioned the employment issue in its findings (J.A. 49), and affirmed the legitimacy of the State's explanation for the sole reason that it was not race-related. (J.A. 71-72.)

In light of its stated reservations, the appeals court's uncritical deference to the trial court finding on these venirepersons was wholly unjustified. A reviewing court must set aside a finding, even if there is some evidence in the record to support it, when the court feels based on the entire evidence that a mistake has been made. *Anderson*, 470 U.S. at 573; *Gypsum Co.*, 333 U.S. at 395. The Court of Criminal Appeals should have clearly rejected findings which it found "shocking and totally not understandable" and the cause for "great concern," rather than sustain them on the basis of its own speculation or artificially narrow view of the record.

This is no less true where the trial court's findings is in part based on a "credibility" determination. *See* J.A. 65. A witness' facially credible testimony may be contradicted or rendered inconsistent by other evidence. *Anderson*, 470 U.S. at 575. Here, the prosecutor's race-neutral explanation concerning the venireperson's hesitancy about circumstantial evidence was squarely contradicted by the prior admission into evidence of defendant's confession. In such a case, a reviewing court should find clear error, even though the finding is purportedly based on a credibility determination. *Id.* The Court of Criminal Appeals committed reversible error when it declined to act on the glaring contradictions in the record before it.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be reversed and the cause remanded.

Respectfully submitted,

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